

Date: July 28, 1994

Case No. 93-ERA-25

EDWARD P. HOLUB
Complainant

v.

**H. NASH BABCOCK, BABCOCK & KING, INC.,
FIVE STAR PRODUCTS, INC., U.S. GROUT CORP.,
U.S. WATERPROOFING DIV., U.S. HIGHWAY PRODUCTS, INC.,
THE NOMIX CORP., THE NASH BABCOCK ENGINEERING COMPANY,
CONSTRUCTION PRODUCTS RESEARCH INC., INTERNATIONAL
CONSTRUCTION PRODUCTS RESEARCH, INC., FIVE STAR
CONSTRUCTION PRODUCTS CANADA, INC., THE BABCOCK
CORPORATION,**
Respondents

**ORDER TO SHOW CAUSE WHY ATTORNEY EUGENE R. FIDELL
SHOULD NOT BE DISQUALIFIED**

On June 10, 1994, an Order issued in the above-captioned case concerning the appearance of Attorney Eugene R. Fidell as one of Respondents' attorneys herein, and his ongoing representation of the Chief Administrative Law Judge of the United States Department of Labor.

On June 17, 1994, responding to that Order, Complainant filed *Motion to Disqualify Eugene R. Fidell*. That motion seeks to disqualify Attorney Fidell "from representing the Respondents in this matter." Complainant's motion states in relevant part as follows:

As the legal counsel for [the] Chief Judge . . . of the Office of Administrative Law Judges, Mr. Fidell is representing him in an action brought by the Solicitor of Labor seeking his removal as Chief Judge. In a conversation between Mr. [George W.] Baker [Complainant's counsel] and Mr. Fidell on June 13, 1994, Mr. Fidell stated that he had been representing the Chief Judge in this matter for approximately two years.

While the Chief Judge does not exercise *decisional* authority over the instant case, he certainly exercises important *procedural* authority.

(*Emphasis in original*). Asserting that, "[t]here are eleven separate instances in which the Chief Judge plays a procedural role in the instant case, . . ." Complainant referred to 29 C.F.R. Part 18. He characterized some of the rules as "ministerial," i.e., §§ 18.17 (receiving stipulations on discovery), 18.31(a) (receiving notice of the disqualification of an administrative law judge) and 18.59 (certification of official record). Complainant referred to "[o]ther[. . . rules . . .] where [the Chief Judge] exercises dual authority with Judge Rosenzweig in discretionary matters," §§ 18.11 (consolidating hearings), 18.24 (issuing subpoenas), 18.26(b) (changing the date, time or place of a hearing), 18.34(g)(2) (permitting non-attorneys to appear) and 18.42(b) and (c) (expedited hearings). Complainant also noted other regulation sections asserting that these provisions are "where [the Chief Judge] either acts in an appellate capacity with regard to Judge Rosenzweig's decision (18.36(b) - disciplining an attorney) or where he acts when Judge Rosenzweig cannot act (18.25 - designation of presiding judge, 18.30 - designation of substitute judge for hearing, 18.31(c) - designation of new administrative law judge when the administrative law judge disqualifies herself)." Complainant also refers to 29 C.F.R. Part 24, PROCEDURES FOR HANDLING DISCRIMINATION COMPLAINTS UNDER FEDERAL EMPLOYEE PROTECTION STATUTES, which, he asserts, contain five references to actions by the Chief Administrative Law Judge, including receiving the employer's appeal. Complainant concludes as follows:

Given these continuing important procedural powers that the Chief Judge can exercise in the instant case, it would be unfair to the Complainant to have as opposing counsel, Mr. Fidell, who continues to represent the Chief Judge in an important case regarding his removal as Chief Judge.

For the foregoing reasons, the Complaint moves that Attorney Eugene R. Fidell be disqualified from representing the Respondents in this [sic] instant case.

(*Complainant's Motion to Disqualify*).

On June 20, 1994, Attorney Eugene R. Fidell filed *Respondents' Response to June 10, 1994 Order*. The Response states in relevant part as follows:

The facts set forth in the Order are, with one exception,* correct. My firm and I have represented [the] Chief Judge . . . since 1992. His case is now pending before the Merit Systems Protection Board and has nothing to do with this proceeding, the parties to it, or the presiding Administrative Law Judge. [The] Chief Judge . . . has no authority over the instant case. The presiding

Administrative Law Judge is not subject to performance rating, see 5 C.F.R. § 930.211 (1993), and enjoys statutorily protected tenure of office. 5 U.S.C. §§ 3105, 7521(a) (1988).

* The exception is that complainant has at least two attorneys, although only one -- George W. Baker -- has appeared in this proceeding. A second attorney from Hawthorne, Ackerly & Dorrance -- Timothy H. Throckmorton -- participated in a meeting with me at Mr. Pickerstein's office last month.

(*Respondents' Response*, June 20, 1994, at p. 1).

Concerning the disclosure issue, Attorney Fidell does state that:

Before accepting this matter, I made an informal inquiry of the Office of the Solicitor of Labor concerning my intent to appear for respondents. I was orally advised that the Department is not a party to this proceeding and has no objection to my appearing for respondents. My firm was retained on April 1, 1994.

I did not bring my representation of [the] Chief Judge . . . to the attention of the Administrative Law Judge or opposing counsel because I was (and remain) aware of no reason, either in substance or appearance, why that representation has any bearing on the propriety of my serving as counsel for respondents. In addition, the very act of making my representation of [the] Chief Judge . . . a matter of record in this proceeding could have been perceived as an indirect effort to derive some implicit advantage. Neither respondents nor I have any desire to do so. The circumstances having now been laid on the public record by the June 10 Order and this memorandum, the matter should be considered closed.

(*Id.* at p. 2). With respect to the authority of the Chief Judge, the Response makes the following assertion:

Complainant evidently objects to my participation based on the theory that [the] Chief Judge . . . might one day be called upon

to perform certain functions in connection with the case. Passing over the fact that function such as appointing a settlement judge, see 29 C.F.R. § 18.9(e)(2), 58 FED. REG. 38500 (July 16, 1993), are obviously ministerial, no such appointment has been requested in this case, and if such a request ever were made, the required action could be taken by the Deputy Chief Judge if need be.

The only specific situation cited by complainant's counsel in attempting to articulate why he believes I am disqualified is that under 29 C.F.R. § 18.36 the Chief Judge would have to rule on any appeal from any order suspending or barring counsel. The short answer to this is that there has been no such order, there has been no such appeal, and even if there were, the Deputy Chief Judge could rule if, as would certainly happen, [the] Chief Judge . . . were to recuse himself. The same is equally true for any other function that might normally fall to the Chief Judge.

(*Id.* at pp. 2--3). Attorney Fidell concludes:

Finally the Order correctly notes that respondents have other counsel. That is of no moment for present purposes, although it is testimony to the complex and multifaceted nature of the congeries of proceedings in which respondents have been unfairly embroiled. The government has fielded a battalion of lawyers from the Justice Department, the United States Attorney's Office and the Nuclear Energy Commission to face our squad in divers contexts. Complainant himself has two lawyers, see note * *supra*, and if wanted to retain others, that would be entirely his affair. So too, absent some substantial basis to interfere with respondents' choice of counsel -- both as to number and identity -- that choice must be respected.

(*Id.* at p. 3). On June 23, 1994, Respondents, through Attorney Fidell, filed a further *Respondents' Answer to Motion to*

*Disqualify*¹:

Complainant's motion to disqualify is unfounded. [The] Chief Judge . . . obviously has a variety of functions under the rules governing these proceedings. A number -- as complainant properly concedes -- are plainly ministerial (as in the case of the powers to certify the agency record, or receive the notice of appeal, discovery stipulations or notice of disqualification of a trial judge). Others are water over the dam (as in the case of the powers to receive the notice of appeal or to designate a trial judge). Still others are inapplicable on their face (as in the case of the powers to consolidate hearings or allow nonattorneys to appear). *But none of these powers has been brought into play since the undersigned was retained or entered his appearance in this proceeding.* As we explained in response to the June 10 Order, if there were, in the future, any developments that called for or permitted action by [the] Chief Judge . . . it is perfectly obvious that he would have to recuse himself. In the circumstances, there is no basis for disqualifying me. Complainant's motion should therefore be denied (footnote omitted).

(*Emphasis in original*)(*Respondents' Answer to Motion to Disqualify*, June 23, 1994, at pp. 1--2).

DISCUSSION

This motion, and the factual constellation giving rise thereto, present a number of difficult issues, both procedural and substantive. Under the circumstances, it seems advisable -- and, hopefully, helpful -- to proceed as if following an analytic road map.

I. This Court's Authority to Rule on the Motion

The first issue to be addressed is whether this Court possesses the authority to rule on a motion for disqualification. The seminal case in this area is **Goldsmith v. Bd. of Tax Appeals**,

¹ This filing also included, *Status Report on Related Proceedings*.

270 U.S. 117 (1926), which involved the right of the United States Board of Tax Appeals to prescribe rules for admission of attorneys and certified public accountants to practice before it under the Revenue Act of 1924. Although Congress did not specifically include a provision in the enabling legislation providing for such rules of admission, the Court held that, "so necessary is the power and so usual is it that the general words by which the Board is vested with the authority to prescribe the procedure in accordance with which its business shall be conducted include as part of the procedure rules of practice for the admission of attorneys." *Id.* at 122.

The concept of agency regulation of those who practice before it, within the context of a disqualification, was affirmed in **Herman v. Dulles**, 205 F.2d 715 (D.C.Cir. 1953). That case involved an attorney who practiced before the International Claims Commission of the United States. After a hearing, the Commission found that the attorney had violated certain canons of ethics of the American Bar Association. Noting that the Commission Rules of Practice and Procedure, § 300.6, prescribes grounds on which an attorney's right to appear may be revoked, including a Commission finding that an attorney has failed to conform to recognized standards of professional conduct, the court found that such finding supported the Commission's action against the attorney.²

² The court also considered the provision of the Administrative Procedure Act dealing with "Ancillary matters," including paragraph (a) "Appearance," then § 6, 60 Stat. 240, 5 U.S.C.A. § 1005. Noting that that section provides that persons compelled to appear before an agency may be accompanied and represented by "counsel," the court also pointed out that:

It does not regulate the qualifications of counsel or provide how agencies may regulate them. During debate on the bill Senator McCarran read with approval the Attorney General's statement that § 6(a) "does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar." *Administrative Procedure Act*, LEGISLATIVE HISTORY, 79th Cong. 2d Sess., Sen.Doc. 248, p. 317. Bills to regulate admissions and disciplinary proceedings in administrative agencies have been introduced but not passed. These include H.R. 8201, 81st Cong., 2d Sess., and H.R. 3097, 82d Cong., 1st Sess. "It is clear * * * that the existing powers of the agencies to control practice before them are not changed by the Administrative Procedure Act. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT,

See also **Schwebel v. Orrick**, 153 F.Supp. 701 (D.C.D.C. 1957), which involved a similar proceeding before the Securities and Exchange Commission. See generally **Touche Ross & Co. v. Securities & Exch. Com'n.**, 609 F.2d 570 (2d Cir. 1979). But see **Camp v. Herzog**, 104 F.Supp. 134 (D.C.D.C. 1952), holding that the attorney in that case was improperly disqualified. The **Herman v. Dulles** court distinguished **Camp v. Herzog**, however, holding it not to the contrary, and stating that, "[i]f the Board [National Labor Relations Board] there involved had issued rules, there would have been 'no question as to its power to discipline.'" 104 F.Supp. at page 138." **Herman v. Dulles**, 205 F.2d at 716--17.³

The next issue to be addressed, then, is whether the Department of Labor possesses such statutory and, therefore, derivative regulatory authority to oversee, and disqualify, counsel. A recent decision of the Secretary of Labor, **Rex v. Ebasco Service, Inc.**, Case Nos. 87-ERA-6, 87-ERA-40 Sec'y. Dec. and Order, March 4, 1994, clearly affirms this authority, citing **Goldsmith**, *supra*, and **Koden v. United States Department of Justice**, 564 F.2d 228, 232--33 (7th Cir. 1977). See also **Crosby v. Hughes Aircraft Co.**, Case No. 85-TSC-2, Sec'y. Dec. and Order, Aug. 17, 1993, *appeal docketed*, **Crosby v. Reich**, No. 91-70834 (9th Cir. 1993); **Cable v. Arizona Public Serv. Co.**, Case No. 90-ERA-15, Sec'y. Dec. and Order, Nov. 13, 1992; **Stack v. Preston Trucking**

1947, p.66.

Herman v. Dulles, *id.* at 717.

³ But *cf.* **Great Lakes Screw Corporation v. NLRB**, 409 F.2d 375 (7th Cir. 1969), involving a hearing before a then-trial examiner which the Seventh Circuit characterized as being "scarred with antagonism, enmity and histrionic pettiness" and that, "[t]he hearing generated more heat than light." *Id.* at 378. On the 13th day of the hearing, the trial examiner excluded the company's chief counsel from the hearing. That ruling was immediately appealed to the Board. The Board upheld the ruling, holding that the trial examiner did not abuse his discretion and was acting within the scope of his authority under the Boards rules. The Board's ruling, however, was made without a hearing, and did not set forth the conduct on which it based its affirmation of the exclusion until it decided the case on the merits in a decision issued two years later. While reaffirming the right to exclude, the court nonetheless held that, "[b]y excluding counsel without setting forth with sufficient particularity the basis for such action, the Board has substantially and prejudicially violated the Administrative Procedure Act. By denying petitioner his statutorily afforded right [to counsel], administrative due process is violated." *Id.* at 380.

Co., Case No. 89-STA-15, Sec'y. Dec. and Order of Remand, April 18, 1990. See also 5 U.S.C. § 301.

II. Which Body of Law or Ethics Applies

Having determined that this Court possesses the authority to rule on the petitioned-for disqualification, the next question to be answered is, to which substantive body of law and ethics does one turn under the circumstances of this case and, subsumed within that issue, which jurisdictional venue controls.

It is noted that **Rex**, and the other decisions of the Secretary cited therein, involved application of FED.R.CIV.P. 11:

[T]he Secretary has held that § 18.36 of the ALJ Rules of Practice provides a remedy for conduct which is dilatory, unethical, unreasonable, and in bad faith, so that Rule 11 of the Federal Rules of Civil Procedure is not applicable because the situation is "provided for or controlled" by Department of Labor Regulations. [Citing **Crosby**, *supra*; **Cable**, *supra*; and **Stack**, *supra*.] I agree . . . that "vexatious pursuit of a groundless action" would constitute dilatory, unethical, unreasonable or bad faith conduct covered by 29 C.F.R. § 18.36(b).

Rex, *id.* at sl. op. 5-6.

Thus, in **Rex**, the administrative law judge sought to impose respondent's attorney fees and costs on complainant, a remedy which, he held, was not provided for by 29 C.F.R. Part 18. He therefore applied FED.R.CIV.P. 11, reasoning that, under § 18.29(a)(8), he would be permitted to do so.⁴ The Secretary,

⁴ 29 C.F.R. § 18.29(a)(8), "**Authority of administrative law judge**," states as follows:

(a) *General powers.* In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to, the following:

* * *

(8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for

however, looking to 29 C.F.R. § 18.34(g)(3), held that a remedy already existed that would resolve the issue, i.e., disqualification.⁵

In the instant case, the remedy sought by Complainant is disqualification, and there is no apparent contention that this Court should look elsewhere for an end-game resolution of this matter. To the extent that there might be a contention, however, that **Rex** stands for the proposition that one must never look beyond the four-corners of Part 18 to determine what does constitute "dilatory, unethical, unreasonable or bad faith conduct" within the meaning of Part 18, this Court finds that it does not so restrict. Thus, a close reading of **Rex** reveals that the conduct which was found to constitute "vexatious pursuit of a groundless action," clearly fell under the rubric of dilatory, unreasonable or bad faith conduct.⁶ Indeed, the Secretary adopted -- without discussion of the implications of the conduct complained of -- the position of the Wage and Hour Administrator that the actions of that complainant's counsel are a form of "dilatory tactics" within the meaning of 29 C.F.R. § 18.36(b). This Court does not interpret this straightforward and uncomplicated analysis of that straightforward and uncomplicated factual predicate, as precluding a review of, and reliance on, other legal precedent in cases which present more thorny questions -- as does this matter.

There are several precedential sources from which to draw that are arguably applicable herein: federal court precedent regarding disqualification of attorneys and recusal of judges;⁷ American Bar

the United States District Courts,
issued pursuant to 28 U.S.C. 2072

. . . .

⁵ **Rex**, *id.* at sl. op. 5-6, 7. I note that the slip opinion cites at page 7, 29 C.F.R. § 18.4(g)(3). No such section exists. The citation was apparently meant to read § 18.34(g)(3), which is entitled, "*Denial of authority to appear.*"

⁶ The conduct complained of involved that complainant's attorney going forward with the case but failing to carry out the responsibilities that such prosecution entails, only to have her reveal at the hearing that neither witnesses nor other evidence would be produced, as well as a concession that a violation of the employee protection provisions of the Energy Reorganization Act could not be proved.

⁷ Although Complainant's motion is aimed at disqualification, Respondents argue that the proper remedy is recusal of [the] Chief Judge . . . should he be asked to somehow

Association MODEL RULES OF PROFESSIONAL CONDUCT;⁸ rulings derived from such Model Code and Rules; and state bar association codes and

act in this case. In truth, the scenario in this case seems to be somewhat of a hybrid, and so both areas of inquiry shall be pursued.

⁸ As noted in **Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3) , et al.**, 39 PIKE AND FISCHER ADMINISTRATIVE LAW (2d) 769, 777 n.8 (Nuc Reg Comm ALAB, 1976), "The [then-]Code of Professional Responsibility consists of Canons, Ethical Considerations and Disciplinary Rules. 'The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers. . . .'
Preliminary Statement to Code. Each Canon is interpreted by Ethical Considerations which 'are aspirational in character' and Disciplinary Rules which are mandatory. *Ibid.*"

The Code now appears to co-exist with the ABA MODEL RULES OF PROFESSIONAL CONDUCT. The "Rules" were promulgated in 1983, and various amendments thereto have been added since then. The 1993 *Rules of Procedure* for the Model Rules provide, in part, as follows:

1. The Committee may express its opinion on questions of proper professional and judicial conduct. The Model Rules of Professional Conduct and the Code of Judicial Conduct, as they may be amended or superseded, contain the standards to be applied. *For as long as a significant number of jurisdictions continue to base their professional standards on then predecessor Model Code of Professional Responsibility, the Committee will continue to refer also to the Model Code in its opinions.*

* * *

12. Opinions of the Committee issued before the effective dates of the Model Rules of Professional Conduct, the predecessor Model Code of Professional Responsibility and the Code of Judicial Conduct continue in effect to the extent not inconsistent with those standards and not overruled or limited by later opinions.

(*Emphasis added*).

rulings.⁹

Regarding the appropriate venue, the Model Rules do provide some guidance. Rule 8.5, "**DISCIPLINARY AUTHORITY; CHOICE OF LAW**," states in relevant part as follows:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with the proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise

The relevant portion of the "Comment" section states as follows:

Disciplinary Authority

Paragraph (a) restates longstanding law.

Choice of Law

A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court or agency with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed

⁹ Precedent derived from this source raises the venue issue.

to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

Paragraph (b) seeks to resolve potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interest of relevant jurisdictions.

Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court or agency before which the lawyer is admitted to practice (either generally or *pro hac vice*), the lawyer shall be subject only to the rules of professional conduct of that court or agency. . . .¹⁰

See MODEL RULES OF PROFESSIONAL CONDUCT, AMERICAN BAR ASSOCIATION (August 1993), as published in Martindale-Hubbell Law Digest (A.B.A. Codes), 1994 Ed. at ABA-37. It is noted therein that there was no counterpart to this Rule in the Model Code. *Id.* at ABA-38.

The question which then arises is where this Court "sits" for purposes of choice of law. Although the undersigned's administrative location is Massachusetts, the above-captioned case

¹⁰ Although this comment to Paragraph (b) would, on its face, appear to resolve the issue, *i.e.*, one applies agency rules; in fact, it only begs the question. Thus, because Part 18 does not address any substantive issues involving ethical conduct that might lead to disqualification, one would expect that the rules of conduct where the court "sits" would apply. See discussion of **Rex v. Ebasco Service, Inc.**, *id.*, at pp. 8-9, *supra*, and this Court's conclusion that reliance on case precedent and other legal materials for a determination of whether the conduct complained of constitutes "unethical" conduct leading to disqualification within the meaning of 29 C.F.R. § 18.36, is permissible.

arises in Connecticut, and will be tried as near to the Stamford location as can be accommodated. Further, any appeal of this case after the Secretary's decision would be to the United States Court of Appeals for the Second Circuit, the circuit within which the alleged violation occurred. See 42 U.S.C. § 5851(c); 29 C.F.R. § 24.7. To the extent that the federal courts have spoken as to the asserted conflict issue, it would appear that the Second Circuit position in this matter would control.

To the extent that a code of ethics of a state bar would apply, one would look to the jurisdictions in which Attorney Fidell is admitted, *i.e.*, District of Columbia, Maryland, New York and Massachusetts.¹¹ He is not admitted in Connecticut, and based on

¹¹ The issue of which code of conduct should be applied in a disqualification situation was considered by the Benefits Review Board in **Baroumes v. Eagle Marine Services**, 23 BRBS 80 (1989), which arose under the Longshore and Harborworkers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq.* In that case, the employer had been represented by an attorney named Doyle in a case involving the claimant, who was awarded benefits. Thereafter, the claimant was again injured, and retained the services of an attorney named Stafne. Not long thereafter, Mr. Doyle, having assertedly taken steps to avoid future conflicts of interest between his former clients and Mr. Stafne's law firm's existing clients, joined Mr. Stafne's law firm. The employer (whom Mr. Doyle had previously represented) requested disqualification of Mr. Stafne and his firm. Stafne declined, and the issue came before the administrative law judge. The Board recapped the judge's *Order Regarding Representation*:

[A]fter finding that Mr. Doyle is not directly involved in the current representation of claimant and that no evidence exists that Mr. Doyle has shared any of the employer's confidences with Mr. Stafne's firm, [the judge] concluded that both Mr. Doyle and his firm were prohibited, pursuant to Rules 1.9 and 1.10 of the Washington [state] Rules of Professional Conduct, from representing claimant in his present action. . . .

Id. at 81. After considering certain other procedural matters not of immediate moment to the instant case, the Benefits Review Board addressed the issue of whether the administrative law judge properly applied the Washington rules. The Board stated as follows:

After initially finding that . . . 29 C.F.R. § 18.36 gave him the authority to preclude a

person from representing a claimant where that representation would contravene reasonable standards, the administrative law judge adopted, as a reasonable standard, the standard contained in Rule 1.10(b) of the Washington [rules] to disqualify Mr. Stafne from representing claimant herein. Specifically, [he] concluded that since Mr. Doyle, who had previously represented employer in a claim filed against it by claimant, was disqualified from representing claimant in his present claim, pursuant to Rule 1.9, . . . Mr. Doyle's new firm was also disqualified, pursuant to Rule 1.10(b) . . . from representing claimant.

Id. at 82-3. Holding that 29 C.F.R. § 18.36 grants an administrative law judge the authority to exclude a representative from appearing in a proceeding before him or her, the Board next addressed which standard is to be applied in making this determination. The Board continued:

Additionally, as the Rules of Practice and Procedure before the Office of Administrative Law Judges do not delineate what constitutes ethical conduct, we hold that the administrative law judge rationally relied upon the Washington [rules] to establish the ethical standard to be applied to the case before him. Advance notice is essential to the rule of law: thus, it is desirable that an attorney be aware of what actions will not be countenanced. See **Paul E. Iacono Structural Engineer, Inc. v. Humphrey**, 722 F.2d 435 (9th Cir. 1983), *cert. denied*, 464 U.S. 851; **In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation**, 658 F.2d 1355 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982). Accordingly, as claimant's counsel practices law within the State of Washington, he should be aware of the state rules of professional conduct and the administrative law judge committed no error in utilizing the Washington [rules] as the standard for ethical behavior in the case before him.

Id. at 83-4. It is noted that the Benefits Review Board nonetheless held that the administrative law judge abused his discretion in ordering disqualification by failing to consider,

the filings sent in support of Respondents' May 12, 1994, motion to suspend these proceedings, he is not appearing *pro hac vice* in the United States District Court for the District of Connecticut.

Paul E. Iacono Structural Engineer, Inc. v. Humphrey, 722 F.2d 435 (9th Cir. 1983), *cert. denied*, 464 U.S. 851, addresses the issue of which code should be applied and the nature of that application. In a conflict situation somewhat analogous to that in **Baroumes v. Eagle Marine Services**, *id.*, the Ninth Circuit agreed with the conclusion that to have force, the ABA Model Code must be specifically adopted. The **Iacono** court stated as follows:

The Model Code is itself not law but rather merely a suggested body of ethical principles and rules upon which reasonable lawyers, concerned about the proper role of the legal profession in American society, have reached a consensus. Since "[a]dvance notice is essential to the rule of law" and since "it is desirable that an attorney or client be aware of what actions will not be countenanced," **In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation**, 658 F.2d [at 1360] . . . the provisions of the Model Code, standing alone, present no just basis for disqualification of a lawyer. Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model Code are merely hortatory, not prescriptive. See *id.* at 1359 n. 5 (upholding disqualification based on violation of provisions of Model Code where "the reference to the ABA Code in Local Rule 1.3(d) [of the United States District Court of the Central District of California] sufficiently invokes Canon 9 as to make it a basis" for disqualification.

Paul E. Iacono Structural Engineer, Inc. v. Humphrey, *id.* at 438-39.

inter alia, evidence of record evidence -- uncontradicted affidavits submitted by Stafne's firm -- that mechanisms had been put into place at the firm which insured that no conflict of interest occurred between Mr. Doyle's former clients and the firm's present clients.

It thus appears that one ought look, in this case, to the rules of the United States District Court for the District of Connecticut to see which ethical rules are to be applied. See also **In re American Airlines, Inc.**, 972 F.2d 605, 609-10 (5th Cir. 1992). As noted above, however, Attorney Fidell is neither licensed to practice law in Connecticut, nor is he appearing *pro hac vice* in the ongoing District Court proceedings involving Respondents herein. He is admitted to practice in the District of Columbia, Maryland, New York and Massachusetts. However, **Baroumes**, **Iacono** and **Petroleum Products**, all emphasize the desirability of an attorney or client being aware of what actions will not be countenanced.

These jurisdictional facts present a problematic situation, but not one incapable of resolution. Thus, the United States District Court for the District of Connecticut Recognizes the Rules of Professional Conduct as approved by the judges of the Connecticut Superior Court as expressing the standards of professional conduct expected of lawyers practicing in the District of Connecticut. See U.S.DIST.CT.RULES D.CONN., CIVIL RULE 3(a)(1).¹² See also **Prisco v. Westgate Entertainment, Inc.**, 799 F.Supp. 266, 268 (D.Conn. 1992). However, the United States Court of Appeals for the Second Circuit applies the American Bar Association Model Code of Professional Responsibility,¹³ and apparently, certain circuits, including the Second Circuit, see no absolute disjunction between rules relied on by a particular Federal district court and the Model Code of Professional Responsibility. See, for example, **International Electronics Corporation v. Flanzer**, 527 F.2d 1288 (2d Cir. 1975). See also **In re American Airlines, Inc.**, in which the Fifth Circuit stated that:

The parties' extensive citation of this court's precedents applying the ABA Model Code suggests their recognition that the Texas Rules, as adopted by the Southern District of Texas, are not the "sole" authority governing this case. Moreover, we do not believe that our holding in **Dresser** [**In re Dresser**

¹² It is noted that the interpretation of said Rules of Professional Responsibility by any authority other than the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Connecticut are not binding on disciplinary proceedings initiated in the United States District Court for the District of Connecticut.

¹³ See 2d Cir.R. § 46(h)(2).

Industries, 972 F.2d 540 (5th Cir. 1992)] has rendered the parties' arguments grounded in the Texas Rules irrelevant to our decision. The Texas Rules were patterned after the ABA Model Rules of Professional Conduct, which the **Dresser** court cited along with the Model Code as the national standards utilized by this circuit in ruling on disqualification motions. *Since the relevant ABA Rules do not differ materially from the corresponding Texas Rules, the parties' interpretations of the Texas Rules are equally applicable in this case.* Our discussion will therefore center on the Texas Rules.

(*Emphasis added*) *Id.* at 610. It is noted that the District of Connecticut has, for example relied on an interweaving of the Connecticut rules and the ABA Model Code. See generally **Trinity Amb. Serv. v. G & L Amb. Serv.**, 578 F.Supp. 1280 (D.Conn. 1984). But see **Prisco v. Westgate Entertainment, Inc.**, 799 F.Supp. 266 (D.Conn. 1992), wherein that court stated, "as with most Second Circuit case law dealing with attorney disqualification, it is based on the ABA Code of Professional Responsibility, while the instant case is governed by the Model Rules of Professional Conduct. *This distinction is often without import, but where former clients are involved, the [Connecticut] Model Rules and the ABA Code impose different standards, and this affects the initial application of the substantial relationship test.*" (*Emphasis supplied*), *id.*, at 271.

Accordingly, and based on all of the above, I find that there is no compelling reason not to restrict the field of consideration to the Connecticut Rules as well as to the Model Code of Professional Responsibility as they both impact on the instant case; and I further find that Attorney Fidell's not being licensed to practice law in the State of Connecticut does not remove his actions -- or failure to act -- from scrutiny. Thus, as noted above, the cases state that it is "desirable," not mandatory, that an attorney who is the subject of a motion to disqualify be on notice as to the rules to be applied. Indeed, in the context of administrative proceedings, where there is no requirement that an attorney be admitted to practice within the state or federal circuit where a particular case arises, application of a "mandatory" standard would have grave consequences. Thus, to apply a mandatory standard in this regard, would often have the effect of eviscerating the authority of the agency involved -- in proceedings before an administrative law judge -- to police the ethical conduct of those who appear before it. This was clearly not the intent of **Goldsmith v. Board of Tax Appeals**, 270 U.S. 117 (1926), and all its

progeny, and I so find.¹⁴

The next legal issue to be addressed prior to an analysis of the facts presently before the Court is the effect to be given the venue-applicable ethical standards. The Fifth Circuit cogently addressed this point in **In re American Airlines, Inc.**, 972 F.2d at 610, stating that, "[a]s we confirmed in **Dresser**, '[m]otions to disqualify are substantive motions affecting the rights of parties and are determined by applying standards developed under federal law.' **Dresser**, at 543; see also **In re Snyder**, 472 U.S. 634, 105 S.Ct. 2874, 2881 n. 6, 86 L.Ed.2d 504 (1985); **In re Finkelstein**, 901 F.2d 1560, 1564 (11th Cir. 1991); **United States V. Miller**, 624 F.2d 1198, 1200 (3d Cir. 1980); **Cord v. Smith**, 338 F.2d 516, 524 (9th Cir. 1964)." The court continued:

Federal courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law. . . .

Id. Indeed, one party in the **American Airlines** case argued strenuously that the Texas rules of conduct controlled the discretion of the federal district court, and asserted that, "a trial court is not forced by literalism or mechanical standards to do injustice serving the mere litigation tactics of a party. Rather a trial court, *according to the Rules*, is to determine if

¹⁴ Cf. **E.F. Hutton & Company v. Brown**, 305 F.Supp. 371 (S.D.Tex. 1969), which also involved a disqualification motion. One of the "subissues," as that court termed it, was the jurisdictional issue of whether the court had sufficient authority to even consider a request for injunctive relief, in the context of the disqualification motion, against a New York law firm who were not resident and had not been admitted to practice generally in the Southern District of Texas. The court further noted that the New York firm had neither moved for, nor been granted, leave to appear as counsel in "this particular cause, and have not affixed their names to any pleading or brief filed on behalf of Hutton." *Id.* at 379. The court's analysis of its authority in this regard is only analogous, but nonetheless instructive, as regards the application of Connecticut state rules of ethics by an attorney who has not, to this Court's knowledge, even appeared *pro hac vice* in the District of Connecticut. *Id.* at 379-80 *et seq.* It is noted, however, that because the instant case may never be considered in federal district court, and if appealed, go directly to the Second Circuit, it may well be that only the American Bar Association Code of Professional Responsibility, as construed by the Second Circuit, applies. See Section V, "Procedure," *infra*, at page 61.

there is actual prejudice or threatened interference with the fair administration of justice.'[Citation omitted] " (*Emphasis in original*) *Id.* In drawing a comparison between itself and other circuits with respect to how aggressively the appropriate standards are to be applied, the Fifth Circuit highlighted, with more than a hint of disapproval, the Second Circuit approach. The Fifth Circuit continued:

Some courts have taken the position . . . that "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." **W.T. Grant Co. v. Haines**, 531 F.2d 671, 677 (2d Cir. 1976); **Board of Educ. v. Nyquist**, 590 F.2d 1241, 1246 (2d Cir. 1979); **Armstrong v. McAlpin**, 625 F.2d 433, 445-46 (2d Cir. 1980). [Citation omitted]. An attorney's ethical violation by itself does not warrant disqualification under this approach. Rather, disqualification is proper only in cases where a court also finds that the unethical conduct threatens to taint the trial. This more limited test largely rests upon a belief that disqualification motions are often made for tactical reasons such as delay or harassment. While the "taint" standard "fails to correct all possible ethical conflicts," **Armstrong**, 625 F.2d at 445, it is argued that this limited disqualification rule serves to deter many meritless, tactical motions that would otherwise be filed.

Id.

It is emphasized that the undersigned does not accept, as the definitive interpretation, the Fifth Circuit's view of the Second, as to this issue. Indeed, in drawing comparisons, one is often moved to place emphasis where it will be most apt to favor one's own position; and, I might add, courts, including this one, are no more immune to this tendency than the average mortal. Accordingly, while the Fifth Circuit's analysis provides a convenient "jumping-off" point, it is the Second Circuit's own view of this federal question that will inform this Court and guide its analysis.¹⁵

¹⁵ It is noted that most of the Second Circuit cases will involve discussions of Canons 4, 5 or 7, of the Code, as well as Canon 9. While the facts of these cases shall be discussed, this Court notes that the facts of the instant case are not identical to those discussed. However, they are presented to provide an

III. Disqualification Motions and the Second Circuit

Just about all of the recent Second Circuit decisions dealing with disqualification motions refer to **Emle Industries, Inc. v. Patentex, Inc.**, 478 F.2d 562 (2d Cir. 1973). **Emle** involved an assertion that one David Rabin, Esq., plaintiffs' attorney therein, breached Canon 4 of the ABA Code, which Canon states that, "[a] lawyer should preserve the confidences and secrets of a client." *Id.* at 564. As an initial matter, the court stated as follows:

We approach our task as a reviewing court in this case conscious of our responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility. This balance is essential if the public's trust in the integrity of the Bar is to be preserved. Moreover, we are mindful that ethical problems cannot be resolved in a vacuum. To affirm the [disqualification] order . . . will, to be sure, deprive plaintiffs of highly qualified counsel of their own choosing and may foreclose Rabin's participation in future actions brought against Burlington and Patentex. There can be no doubt, however, that we may not allow Rabin to press these claims against Patentex if, in doing so, he might employ information disclosed to him in confidence during his prior defense of Burlington. Such a result would work a serious injustice upon Burlington and Patentex and would tend to undermine public confidence in the Bar. Thus, even an appearance of impropriety requires prompt remedial action by the court.

Id. at 564-65. In its discussion of the ethical standards to be followed, the Second Circuit noted the "substantially related" test articulated by Judge Weinfeld in **T.C. Theatre Corp. v. Warner Bros. Pictures**, 113 F.Supp. 265 (S.D.N.Y. 1953), *i.e.*, that matters encompassed by a pending suit, wherein a party's former attorney appears on behalf of his adversary are substantially related to the matters wherein that attorney represented him, the former client. Judge Weinfeld went on to state that, "[t]he court will assume that

indication of how the Second Circuit analyzes issues involving disqualification; and, as a corollary thereof, how aggressively that court applies and enforces the Canons, *i.e.*, the "federal question," herein.

during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." *Emle*, *id.* at 570. The *Emle* court continued:

Canon 4 implicitly incorporates the admonition . . . that [a lawyer is obliged to represent the client with undivided fidelity and forbids disclosure of secrets or confidences and thus] forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed. . . . Without strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that [the revealed] information . . . may be used against him A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.¹⁶ In neither event would the litigant's or the public's interest be well served. The dynamics of litigation are far too subtle, the attorney's role in that process far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's

¹⁶ Indeed, I note that even Attorney Fidell admits to this possibility when he notes in his June 16, 1994, response, that, "[i]n addition, the very act of making my representation of Chief Judge Litt a matter of record in this proceeding could have been perceived as an indirect effort to derive some implicit advantage."

representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

Id. at 570-71. The court commented further on the "appearance of impropriety:"

Nowhere is Shakespeare's observation that "there is nothing either good or bad but thinking makes it so," more apt than in the realm of ethical considerations. It is for this reason that Canon 9 . . . cautions that "A lawyer should avoid even the appearance of professional impropriety" and it has been said that a "lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact." American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 885 (Nov. 2, 1965).

Id. In affirming the disqualification order, **Emle** concludes as follows:

We have said that our duty in this case is owed not only to the parties . . . but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct.

Id. at 575.¹⁷

¹⁷ In terms of chronology, the next case that would be considered would be **Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.**, 496 F.2d 800 (2d Cir. 1974)(*en banc*). However, that case was primarily concerned with the appealability of a motion to disqualify; and while that issue is of import herein, **Silver Chrysler Plymouth** was subsequently overruled in **Armstrong v. McAlpin**, 625 F.2d 433 (2d Cir. 1980)(*en banc*), *vacated on*

General Motors Corporation v. City of New York, 501 F.2d 639 (2d Cir. 1974), involved litigation in which the City asserted that GM had violated the antitrust law by monopolizing or attempting to monopolize the nationwide market for municipal buses. Within the context of the substantive issues, a motion for disqualification of the City's privately retained counsel (George D. Reycraft) was filed by GM, asserting a breach of the ethical precepts embodied in Canon 9 and Disciplinary Rule (DR) 9-101(B) of the Code of Professional Responsibility. Canon 9 states that, "[a] lawyer should avoid even the appearance of professional impropriety." "DR 9-101(B) prohibits '[a] lawyer . . . [from accepting] private employment in a matter in which he had substantial responsibility while he was a public employee.'" **General Motors Corporation**, *id.* at 641 n. 1. The facts reflect that Reycraft had been an attorney in the Antitrust Division of the Department of Justice, who had been substantially involved in an action brought under the Sherman Act by the United States against GM. The action was based on GM's alleged monopolization of a nation-wide market for the manufacture and sale of city and intercity buses. The court referred to this case as the "1956 Bus case." This 1956 case was, as the court put it, "a matter which, at the very least, was similar to the dispute for which his retention was sought" *Id.* at 642. Reversing the District Court, which had denied the motion for disqualification, the Second Circuit cited **Emle**, and discussed Canon 9 of the Code:

Indeed, the "public's trust" is the *raison d'être* for Canon 9's "appearance of evil" doctrine. Now explicitly incorporated in the profession's ethical Code,[fn. omitted] this doctrine is directed at maintaining, in the public mind, a high regard for the legal profession. The standard it sets -- *i.e.* what creates an appearance of evil -- is largely a question of current ethical-legal mores. See Kaufman, the Former Government Attorney and the Canons of Professional Ethics, 70 Har.L.Rev. 657, 660 (1957).

Nor can we overlook that the Code of Professional Responsibility is not designed for Holmes' proverbial "bad man" who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law. Holmes, *The Path of the Law*, in *Collected Legal Papers* 170

other grounds and remanded, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981), *decision on remand*, 699 F.2d 79, 94 (2d Cir. 1983), discussed *infra*.

(1920). Rather, it is drawn for the "good man," as a beacon to assist him in navigating a ethical course through the sometimes murky waters of professional conduct. Accordingly, without in the least even intimating that Reycraft himself was improperly influenced while in Government service, or that he is guilty of any actual impropriety in agreeing to represent the City here, we must act with scrupulous care to avoid any *appearance* of impropriety lest it taint both the public and private segments of the legal profession.

(*Emphasis in original*) *Id.* at 649. Citing **Emle's** citation of Shakespeare, the court concluded that, while the 1956 case and the one there under consideration were not identical, "[b]oth . . . allege monopolization or attempted monopolization of the *same* product line [fn. omitted] -- city buses -- and, in the *same* geographic market -- the United States. The subtleties of differential proof will not obviate the "appearance of impropriety" to an unsophisticated public." *Id.* at 651.

Six months after the Second Circuit decided **General Motors**, it addressed a disqualification motion in **Ceramco, Inc. v. Lee Pharmaceuticals**, 510 F.2d 268 (2d Cir. 1975). This case involved a trademark infringement suit involving denture adhesive being sold under the name "Genie" by Lee Pharmaceuticals. In order to establish whether suit could be brought in the Eastern District of New York, Towell, one of Ceramco's attorneys, telephoned Lee's order department, and without identifying himself or his position as one of Ceramco's lawyers, requested the names of dental supply houses in the Eastern District which were distributing "Genie." Asserting that Towell had violated Canon 7 ("zealous representation"), Canon 5 (that the telephone calls made Towell a "witness for his client") and Canon 9 ("appearance of impropriety"), Lee moved for disqualification. Denying the motion, the Second Circuit offered its opinion that, "[t]his is the kind of misconduct, if it is misconduct, which is technical in character, does no violence to any of the fundamental values which the canons were written to protect and certainly falls far short of justifying a grant of the relief requested." *Id.* at 271. The court then made a comparison:

The typical situation in which disqualification has been found to be an appropriate remedy has involved a conflict of interest such that continued representation by chosen counsel clearly prejudiced the rights of the opposing party and, by creating the appearance of impropriety, posed a substantial threat to the integrity of the judicial process. . . . In sum, Ceramco's counsel's

actions, while demonstrating an unfortunate insensitivity to the etiquette of the bar, had no possibility of so prejudicing the opponent that the firm should be barred from the case entirely or the client punished by precluding reliance on counsel's work product. Accordingly, if any corrective action is to be taken, it should be accomplished under the auspices of the appropriate bar association and should in no way be permitted to affect the decision on the merits of the case.

Id.

The next case in the evolution of the Second Circuit's view of attorney disqualification is **Hull v. Celanese Corporation**, 513 F.2d 568 (2d Cir. 1975). It is with this case that the court begins to articulate a balancing test between a party's right to its counsel of choice as against maintaining the highest standards of conduct. The Second Circuit articulated the issue as follows:

[W]hether a law firm can take on, as a client, a lawyer for the opposing party in the very litigation against the opposing party. Factually, the case is novel and we approach it mindful of the important competing interests present. It is incumbent upon us to preserve, to the greatest extent possible, both the individual's right to be represented by counsel of his or her choice and the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice.

Id. at 569. The facts were as follows: Hull had been employed by Celanese since 1963 and, in September of 1972, initiated a sex-based discrimination suit against that corporation. Attorney Delulio began work at Celanese in July 1972, and was assigned to work on the defense of the Hull case in February of 1973, and her work on that case continued until September of 1973. During this latter month, Hull and Delulio met socially, and two months thereafter, Delulio approached Hull for the name of the law firm representing Hull. Delulio thereupon contacted the Rabinowitz firm on November 9, 1973, and six days thereafter, the Rabinowitz firm filed sex discrimination charges on behalf of Delulio with the EEOC. The court noted that, "Delulio thereafter consulted with the [New York Bar] regarding, *inter alia*, the propriety of her intervention in the **Hull** action. [The New York Bar advised] . . . against intervention. [Fn. omitted]. Subsequently, the motion herein seeking intervention on behalf of Delulio and four other women was filed. Two weeks later Celanese cross-moved to deny intervention and to disqualify the Rabinowitz firm." *Id.* at 570.

Noting that, "in the disqualification situation, any doubt is to be resolved in favor of disqualification[,], **Fleischer v. A.A.P., Inc.** 163 F.Supp. 548, 553 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030 (1959)[,]" the court observed that while the facts of **Hull** were distinguishable from those in **Emle**, "the conclusions reached in that case apply with equal validity here." *Id.* at 571. The court also noted that in **Emle**, "[it was] felt that the invocation of Canon 9 . . . was particularly appropriate.[Fn. omitted]." *Id.* Thus, in **Emle**, the lawyer switched sides to represent an adverse interest in a subsequent, but substantially related, case; whereas in **Hull**, the inhouse lawyer for Celanese switched sides to become a plaintiff in the same action. The court continued:

Thus, while the cases are factually distinguishable, the admonition of Canon 9 is equally appropriate here. This is, in short, one of those cases in which disqualification is "a necessary and desirable remedy . . . to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information" See **Ceramco, Inc. v. Lee Pharmaceuticals**, 510 F.2d 268, 271 (2d Cir. 1975).

Id. The Rabinowitz firm argued strenuously that *they* had never worked for Celanese and that they had "carefully cautioned" Delulio not to reveal any information or confidences she had received in her capacity as a lawyer for Celanese, but to confine herself to the facts of her own case. They contended that because they never received any confidential information either directly or indirectly, they could not use it either consciously or unconsciously. The court responded:

This argument, somewhat technical in nature, seems to overlook the spirit of Canon 9 as interpreted by this Court in **Emle**. We credit the efforts of the Rabinowitz firm to avoid the receipt of any confidence. Nonetheless, **Emle** makes it clear that the court need not "inquire whether the lawyer did, *in fact*, receive confidential information. . . ." **Emle Industries**[, *id.* at 571]. Rather, "where 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation,' **T.C. Theatre Corp.**, *supra* [113 F.Supp.], at 269 (emphasis supplied), it is the court's duty to order the attorney disqualified." *Id.* at 571. The breach of

confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code.

Id. at 572.

Not long after **Hull**, the Second Circuit issued its opinion on the merits of the disqualification motion in **Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation**, 518 F.2d 751 (2d Cir. 1975). The substance of the underlying case involved a breach of contract issue with respect to a lease agreement, as well as a cause of action arising under the so-called Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.* This portion of the claim alleged threats amounting to coercion or intimidation forcing Silver Chrysler, under threat of eviction, to sign a new agreement at a higher rental. Chrysler was represented by the law firm of Kelley Drye. Silver Chrysler was represented by the law firm of Hammond & Schreiber. Dale Schreiber of that firm had been employed as an associate by Kelley Drye, and while there, had worked on certain Chrysler matters. Based on this scenario, Kelley Drye brought the motion for disqualification.

District Judge Jack B. Weinstein considered the motion below, and the Second Circuit noted that, "[i]n support of, and in opposition to, the motion respectively, the parties submitted voluminous affidavits, copies of pleadings in cases in which Schreiber had allegedly worked, and extensive memoranda of law. With this material before him and after oral argument, the judge proceeded to analyze the motion on the theory that "[d]ecision turns on whether, in the course of the former 'representation,' the associate acquired information reasonably related to the particular subject matter of the subsequent representation.'" *Id.* at 753. Judge Weinstein held the disqualification of Schreiber not warranted.¹⁸

The Second Circuit began its analysis by citing Canons 4 and 9, as well as **Emle** and its progeny. The court then stated as follows:

Thorough consideration of the facts, as more

¹⁸ It is once again noted that the facts of the instant case are not on all fours with the facts of the Second Circuit cases under discussion. What is important, however, is to understand the principles relied on by that court, how the facts before it are analyzed -- a particularly interesting aspect of **Silver Chrysler** -- and, indeed, the procedures utilized by the courts below in arriving at factual findings -- although this latter issue shall be discussed in more detail, *infra*.

elaborately set forth in the opinion below, is required.³ *Nor can judges exclude from their minds realities of which fair decision would call for judicial notice.*

³ As a district judge, now Chief Judge Kaufman, the author of the **Emle** opinion, said in **United States v. Standard Oil Company**, 136 F.Supp. 345, 367 (S.D.N.Y. 1955), while refusing to disqualify an attorney:

When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

(*Emphasis supplied*). *Id.* at 753. The court, noting that Schreiber began work at Kelley Drye after graduation from law school, and that he worked there for approximately two and one-half years, seemed to take judicial notice of the attenuated relationship between *summer law students* and the firms which employ them, although it does not appear that Schreiber was ever employed as a summer associate. The court continued on its apparent path of judicial notice:

Even after an initial association with a firm upon graduation, it is not uncommon for young lawyers to change their affiliation once or even several times. It is equally well known that the larger firms in the metropolitan areas have hundreds (collectively thousands) of clients. It is unquestionably true that in the course of their work at large law firms, associates are entrusted with the confidence of some of their clients. But it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting. And a rational interpretation of the Code of

Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms.

Id. 753-54. The court noted that, while the Second Circuit does recognize that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, such inference is rebuttable, and quoted from **Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures**, 224 F.2d 824 (2d Cir. 1955):

"It will not do to make the presumption of confidential information rebuttable and then to make the standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet."

224 F.2d at 827. The importance of not unnecessarily constricting the careers of lawyers who started their practice of law at large firms simply on the basis of their former association underscores the significance of this language. [Citation omitted].

Id. at 754. Noting that the Second Circuit has also adhered to the "substantial relationship" test, *i.e.*, that, "'the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matter or cause of action wherein the attorney previously represented him, the former client." **T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.**, 113 F.Supp. 265, 268 S.D.N.Y. 1953).'" *Id.*, the court also cited **United States v. Standard Oil Company**, 136 F.Supp. 345, 355 (S.D.N.Y. 1955), for the proposition that, "'[u]nfortunately, the cases furnish no applicable guide as to what creates a 'substantial' relationship.' The cases available at that time were cases in which the relationship was 'patently clear.'" *Id.* at 754.¹⁹ The court characterized the **Hull**, **General Motors** and **Emle** cases, *inter alia*, as reflecting a patently clear substantial relationship. Relying on affidavits submitted to Judge Weinstein, the Second Circuit

¹⁹ The court noted at footnote 4 that, in **Standard Oil**, "'No such glaringly obvious relationship exists in this case' and, applying a substantial relationship test, refused to disqualify counsel. 136 F.Supp. at 355-59." *Id.* at 754.

contrasted the **Silver Chrysler Plymouth** situation with the "patently clear" cases cited above, stating that, "Schreiber was not counsel for Chrysler in the sense that the disqualified attorneys were in those cases. Although Kelley Drye had pervasive contacts with Chrysler, Schreiber's relationship cannot be considered co-extensive with that of his firm." *Id.* at 756. While conceding that the evidence before Judge Weinstein was "admittedly somewhat conflicting," the Second Circuit reviewed, and, in essence, affirmed, Judge Weinstein's credibility resolutions with respect to Schreiber's purported involvement.

The Second Circuit then did an interesting thing. Noting that there is no basis to formulate a *per se* rule based on title alone, *i.e.*, "partner" versus "associate," when trying to ascertain the extent of involvement in particular cases, the court stated as follows:

But there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. In large firms at least, the former are normally the more seasoned lawyers and the latter the more junior. This is not to say that young attorneys in large firms never become important figures in certain matters but merely to recognize that some of their work is often of a far more limited variety. Under the latter circumstances the attorney's role cannot be considered "representation" within the meaning of **T.C. Theatre Corp.** and **Emle** so as to require disqualification. Those cases and the Canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

Id. at 756-57.²⁰ Once again referring to the factual affidavits

²⁰ The court makes an interesting analytical leap here. Thus, while all the previous decisions it cites as reflecting a patently clear substantial relationship relate that relationship solely to the causes of action at issue; the **Silver Chrysler Plymouth** court also injects the relationship of the lawyer in question to the cause of action, as well as the relationship of the lawyer in question to his previous firm. Indeed, it is to

before Judge Weinstein, the Second Circuit noted that, "Chrysler was in a position here conclusively to refute Schreiber's position that his role in these cases had been non-existent or fleeting. Through affidavits of those who supervised Schreiber on particular matters or perhaps through time records, the issue was capable of proof. Chrysler instead chose to approach the matter in largely conclusory terms."⁸ [⁸ Example from a Kelley Drye (Chrysler) affidavit: '[Schreiber] obtained unmeasurable confidential information regarding the practices, procedures, methods of operation, activities, contemplated conduct, legal problems, and litigations of [Chrysler]., J.A. 29(a).] We cannot realistically subscribe to the contention that proof submitted for this limited purpose, by time records or otherwise, would have necessitated disclosure of any confidences entrusted to Kelley Drye." *Id.* at 757.

With respect to Canon 9, the court stated as follows:

Finally, in view of the conclusion that Schreiber's work at Kelley Drye does not necessitate disqualification, we agree with the district court that refusal to disqualify Schreiber and his firm will not create an appearance of impropriety. Neither Chrysler nor any other client of a law firm can reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from *subsequently* representing an opposing party. Although Canon 9 dictates that doubts should be resolved in favor of disqualification, **Hull v. Celanese Corp.**, *supra*, 513 F.2d at 571, it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.

(*Emphasis added*). *Id.* Finally, the court concluded:

A decision to sustain Judge Weinstein's denial of the motion does not diminish the force of our decisions which hold that the right of the public to counsel of its choice or the possibility of a reduction of "both the economic mobility of employees and their personal freedom to follow their own interests" . . . must be secondary considerations to the paramount importance of

this last aspect that much of its "judicial notice" regarding law firm etiquette is based.

"maintaining the highest standards of professional conduct and the scrupulous administration of justice." **Hull v. Celanese Corp.**, *supra*, 513 F.2d 569.[Footnote omitted].

*Id.*²¹

The claim of disqualification in **Lefrak v. Arabian Am. Oil Co.**, 527 F.2d 1136 (2d Cir. 1975), involved, in the context of antitrust litigation, an assertion of improper solicitation of clients directly or indirectly through laymen, and accepting employment as a result of that solicitation. The court emphasized that, ". . . there is no evidence and no claim made that the plaintiffs in the three separate pending antitrust actions were in fact solicited by their counsel or anyone else. Rather, the charge is that counsel solicited *other* prospective plaintiffs, none of whom have surfaced as intervenors or as plaintiffs in comparable actions against the defendants-appellants. In sum, there is no taint attached to counsel's representation of the clients who are plaintiffs in the pending law suits." *Id.* at 1139. The court continued:

The misconduct complained of does not infect either the merits, the competence or the ethics of the representation in the pending actions. . . . There has been no taint established and no possible prejudice to the defendant in permitting these actions to proceed to trial and judgment.

Id.

International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975), involved an appeal by the law firm for the defendants from the granting of a motion to disqualify them from representing a former partner and former clients in a litigation. Noting that,

²¹ It is apparent that the Second Circuit was not entirely secure in its decision. Thus, the final paragraph of the opinion states as follows:

If during such further preparation, or even during the trial itself, there should appear indications that confidential information not apparent from the proof submitted thus far is being used, the trial judge will be available for such action as may be appropriate.
[Footnote omitted].

Id. at 758.

"[s]uch moves and countermoves by adversaries appear to have become common tools of the litigation process[,]" the court requested *amici* briefs from four bar associations, including the Connecticut Bar Association. The disqualification motion involved Julius Apter, a former partner in the firm of Apter, Nahum & Lenge, who, at the time of the Second Circuit decision, was fully retired from the practice of law by virtue of illness and age. The plaintiffs had filed a motion in the District of Connecticut to disqualify the firm from representing any of the defendants, asserting that Julius Apter was a partner in the firm when the litigation was instituted, had played the principal role in the negotiation of the sale and merger, and would be a material witness as to those substantive issues. By way of response, Julius Apter filed an affidavit in which he swore that he had not practiced law since January of 1974, and that he had retired from the Apter firm.

Noting that the District Court had made no mention of Canon 4, the Second Circuit agreed that Canon 4 was not applicable, and noted that the briefs of both the Connecticut and New York Bar Associations recommended that conclusion. The Second Circuit also found that the strict Connecticut rules, which differed in some respect from the ABA Code, would also not act to disqualify the Apter firm. Holding that it found no ethical justification for disqualification of the law firm from representing at trial its former partner Julius Apter as a party defendant, the court also addressed Canon 9, and stated as follows:

From what we have said, it must be clear that we do not think the question of "appearances" under Canon 9 is particularly acute in this case. We caution, as the Connecticut Bar Association urges us to do, that Canon 9, though there are occasions when it should be applied, should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.

Id. at 1295.

The next case of import in the Second Circuit is **W.T. Grant Co. v. Haines**, 531 F.2d 671 (2d Cir. 1976), which, in the context of an antitrust action brought by the corporation against certain parties, including a former employee, involved a motion for disqualification of the corporation's law firm for asserted improper communication with the employee while he was unrepresented by counsel. Reviewing the facts of the case in the context of Canon 7, and Disciplinary Rule 7-104, "Communicating with One of Adverse Interest," the court emphasized the facts of the case:

Haines was hardly a stranger to Grant. He was its representative as Regional Director of its

real estate department, he had been employed by it for about ten years, and he had received some \$200,000 of its money as salary or bonus over that period. He was presumably a sophisticated businessman who was questioned on matters within his competence, which related to his stewardship, and which unquestionably involved his honesty and fiduciary obligations to his employer. He was neither a callow youth nor a befuddled widow. A reading of the transcript reveals his willingness to discuss freely the use of automobiles, entertainment opportunities and loans from those dealing with Grant. We do not characterize the admission or the discussion generally as necessarily inculpatory--the point is that Grant had the right to inquire into this matter even absent Haines' representation by counsel. Although fully aware of the serious nature of the charges, Haines chose to speak for the record without benefit of counsel.

Id. at 674-75. With respect to certain authorizations which Haines was asked to sign by Grant's attorney, the court noted that whether the request constituted "advice" within the Code and "whether Haines acted on that advice or because of his own sense of obligation to Grant is a close question. [Footnote omitted]. We cannot escape the fact, however, that outside counsel knew that Haines was about to be served [with a lawsuit] and knew that he could not clear his name or prevent his discharge. This was found below and the conduct of counsel was properly characterized there as 'somewhat overbearing' and 'lack[ing] the sensitivity which members of the bar should show in dealing with laymen.' We agree that the procedures adopted here were at least inappropriate and certainly not to be encouraged." *Id.* at 676.

Having endorsed the District Court's characterization of the attorney's conduct, the Second Circuit then stated that, "[h]owever, the fact of professional misconduct is not necessarily determinative of the issue before us. The question is whether or not that conduct should merit the sanction sought, . . . disqualification of counsel from continuing representation of Grant." *Id.*²² In this regard, the court noted that, while the district court was critical of counsel's conduct, it nonetheless refused to impose the sanction, and that, "[w]e have consistently

²² It is noted that Haines also sought dismissal of the complaint based on counsel's conduct. The court declined to so order.

held that the remedy of disqualification rests in the discretion of the district court and its determination will only be upset upon a showing of abuse. [Citations omitted]." *Id.* Recapping the facts and emphasizing that the actions of counsel violated no canon or disciplinary rule by its interrogation of Haines without the presence of his attorney; and noting that, "[w]hile Haines did sign authorizations which would presumably facilitate further leads or uncover assets which could be attached or levied upon in the event a judgment against him was obtained, the injury he might suffer is speculative at best at this point. The issue then is whether under these circumstances a court should disqualify counsel." *Id.* at 677. In making that determination, the court proceeded to balance the nature of the conduct against Grant's right to counsel of its choice. In this regard, the court looked at the following factors:

As Judge Clark suggested in **Fisher** and as we have recently noted in **Lefrak**, we cannot lightly separate Grant from the counsel of its choice. Counsel here has been engaged for well over a year in the investigation and preparation of this lawsuit. Disqualification of present counsel and the substitution of a new attorney unfamiliar with the facts and the law will inevitably result in further harmful delay and expense to Grant. The transcript of the Haines interview is a public record. . . . While disqualification is clearly punitive insofar as Grant and its outside counsel are concerned, its benefit to Haines is indeed questionable. The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it. **Lefrak v. Arabian American Oil Co.**, *supra*, 527 F.2d at 1141. Plaintiff has failed to establish that taint here in our judgment. If the Liebman firm is guilty of professional misconduct, as to which we express no view, the appropriate forum is the Grievance Committee of the bar association. Whatever sanction if any that is imposed there will not affect the rights of a plaintiff long since embarked upon serious litigation.

Id.

The next case of import is **Bd. of Ed. of N.Y. City v. Nyquist**, 590 F.2d 1241 (2d Cir. 1979). The underlying litigation giving rise to the disqualification motion involved a merging of separate male and female physical education teachers' seniority lists for purposes of layoff. The male teachers alleged that maintaining

separate lists was illegal; the female teachers asserted that their seniority status would perpetuate plaintiff's past discriminatory practices, and that if the merged list were to be used for layoff purposes, six times as many female teachers would be laid off. As the court noted, "The stakes in the lawsuit are obviously high." *Id.* at 1243.

The male teachers were represented by an attorney who was also general counsel to the state teachers' union. Under the union's legal services program, its members could apply for free legal representation, and the case would be taken on when in the judgment of the legal staff, the case was both job-related and meritorious. It was through this procedure that the male teachers retained Attorney James R. Sandner, the General Counsel, as their attorney. The union itself, however, took no position on the merits, or on any other issue in the litigation. The female teachers moved to disqualify Sandner, or in the alternative, to require the union to furnish counsel for the female teachers. The Second Circuit noted that District Judge Lasker "concluded that 'the female teachers are paying, in part, for their opponents' legal expenses.'" This violated 'at least the spirit, if not the letter, of Canon 9 of the Code of Professional Responsibility that "A lawyer should avoid even the appearance of impropriety."' Accordingly, the judge granted the motion and this appeal by the male [teachers] followed." *Id.* at 1244.

Rejecting certain arguments relating to fair representation in the context of a union's duty to its membership, as well as certain First Amendment contentions, the court addressed its power to disqualify attorneys. The court noted that, historically, "attention has focused on identifying the circumstances in which exercise of the power is appropriate. Our reading of the cases in this circuit suggests that we have utilized the power of trial judges to disqualify counsel where necessary to preserve the integrity of the adversary process in actions before them." The court continued:

In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney's conflict of interests in violation of Canons 5 and 9 . . . undermines the court's confidence in the vigor of the attorney's representation of his client, see, e.g., **Fund of Funds, Ltd. v. Arthur Andersen & Co.**, 567 F.2d 225 (2d Cir. 1977); **Cinema 5, Ltd. v. Cinerama, Inc.**, 528 F.2d 1384 (2d Cir. 1976), or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example in violation of Canons 4 and 9,[footnote

omitted] thus giving his present client an unfair advantage, see, e.g., **Fund of Funds, Ltd. v. Arthur Andersen & Co.**, *supra*; **Emle Industries, Inc. v. Patentex, Inc.**, 478 F.2d 562 (2d Cir. 1973).

Id. at 1246. Noting that, "in other kinds of cases, we have shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct, [citing **W.T. Grant**, *supra*, and **Ceramco, Inc.**]" the court offered as its rationale for that reluctance its view that, "disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons. See **Allegaert v. Perot**, 565 F.2d 246, 251 (2d Cir. 1977); **J.P. Foley & Co., Inc. f. Vanderbilt**, 523 F.2d 1357, 1360 (2d Cir. 1975)(Gurfein, J., concurring). And even when made in the best of faith, such motions inevitably cause delay. . . ." The court concluded setting forth its legal position by stating as follows:

Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to "taint the underlying trial," see **W.T. Grant Co.**, *supra*, 531 F.2d at 678, by disturbing the balance of the presentations in one of the two ways indicated above, courts should be quite hesitant to disqualify an attorney.

*Id.*²³ Applying this legal framework to the facts, and noting that Sandner was disqualified by the district court because a layman would be "severely troubled" by the fact that the female teachers are paying, in part, for their opponents legal expenses, the Second Circuit rejected that reasoning, and offered the following analysis:

There is no claim . . . that Mr. Sandner feels any sense of loyalty to the women that would undermine his representation of the men. Nor is there evidence that his representation of the men is anything less than vigorous. There is also no claim that the men have gained an unfair advantage through any access to privileged information about the women. Were there any such problem, the women would not be asking, and the district judge would not have

²³ In this regard, the court noted the availability of federal and state comprehensive disciplinary machinery.

ordered, as an alternative to disqualification of Mr. Sandner, that [the Union] pay their attorney's fees. Thus, in no real sense can Mr. Sandner's representation of the men be said to taint the trial.

Id. at 1247. With respect to the Canon 9 issue, the court stated that, "there is at least some possibility that Mr. Sandner's representation of the men has the appearance of impropriety, because of the large number of union members involved and the public importance of the civil rights issue at the heart of the dispute." The court concluded:

But in any event, we think that disqualification was inappropriate. We believe that when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases. This is particularly true where, as in this case, the appearance of impropriety is not very clear.

*Id.*²⁴

In 1980, the Second Circuit decided **Armstrong v. McAlpin**, 625 F.2d 433 (2d Cir. 1980)(*en banc*), *vacated on other grounds and remanded*, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981), *remand decision*, 699 F.2d 79, 94 (2d Cir. 1983), and is of interest because it overruled the first **Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.**, *supra*, 496 F.2d 800, the **Armstrong** court holding that orders denying motions to disqualify are not immediately appealable.²⁵

With respect to the substantive aspects of the motion to disqualify, the court declined to disqualify a former government attorney who was subsequently employed by a law firm representing

²⁴ It is important to note, however, that the court pointed to the possibility of other available remedies in the event the union took a position with respect to the merits of the litigation, then bringing the case within the ambit of the "fair representation" cases, as well as the possibility for grievance proceedings. Finally, the court pointed out that, "it may be that judicial construction of the plan, in an appropriate lawsuit, could provide some relief for the women." *Id.*

²⁵ This procedural issue and its relevance herein will be discussed, *infra*.

the receiver in the underlying SEC litigation because (a) the attorney was carefully screened from the litigation by his law firm, (b) the appearance of impropriety was insufficient to warrant disqualification as such appearance was not sufficiently manifest, and (c) the adverse consequences of separating the law firm from its client. Quoting extensively from its **Board of Education v. Nyquist** decision, the court stated that, "the current uncertainty over what is 'ethical' underscores for us the wisdom, when considering such issues, of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process." **Armstrong v. McAlpin**, 625 F.2d at 444.

Holding that the district court justifiably held that the firm which employed the former SEC attorney, and which also represented the receiver, posed no threat to the integrity of the trial process in light of the screening put in place by that firm, the court stated that, "disqualification of the firm can only be based on the possible appearance of impropriety stemming from Altman's [former SEC attorney] association with the firm. However, as previously noted, reasonable minds may and do differ on the ethical propriety of screening in this context. But that can be no doubt that disqualification of [the firm] will have serious consequences for this litigation; separating the receiver from his counsel at this late date will seriously delay and impede, and perhaps altogether thwart, his attempt to obtain redress for defendants' alleged frauds. Under the circumstances, the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear.' **Nyquist**, *supra*, 590 F.2d at 1247." *Id.* at 445. The court concluded as follows:

However, absent a threat of taint to the trial, we continue to believe that possible ethical conflicts surfacing during a litigation are generally better addressed by the "comprehensive disciplinary machinery" of the state and federal bar Nor do we believe . . . that a failure to disqualify [here] . . . based on the possible appearance of impropriety will contribute to the "public skepticism about lawyers." While sensitive to the integrity of the bar, the public is also rightly concerned about the fairness and efficiency of the judicial process. We believe those concerns would be disserved by an order of disqualification in a case such as this, where no threat of taint exists and where appellants' motion to disqualify . . . has successfully crippled the efforts of a receiver, appointed at the request of a public agency, to obtain redress for alleged serious frauds on the investing public. Thus, rather

than heightening public skepticism, we believe that the restrained approach this court had adopted towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidence in the fairness of the judicial process.

Id. at 446.²⁶

²⁶ It should be noted, as the court took great pains to point out in the factual portion of its opinion, this case involved securities fraud assertedly perpetrated by Clovis McAlpin and Robert Vesco, who thereafter fled to Costa Rica. When they, and other defendants, failed to appear, the SEC obtained a default judgment, and Michael Armstrong was appointed the receiver, having the responsibility for recovering all monies and property misappropriated by defendants. To this end, Armstrong was authorized to initiate litigation in this country and abroad. The law firm of Barrett Smith Schapiro & Simon was appointed as Armstrong's counsel, and the firm expended an enormous amount of time and resources preparing for the litigation. More than one year later, the receiver and Barrett Smith became aware of a potential conflict of interest involving an institutional client of Barrett Smith that might become a defendant in the SEC litigation. Thus, the receiver concluded that it was necessary to substitute litigation counsel. The problem that arose, however, was that it was necessary to find a firm that could not only take on the complex litigation in the United States and in Costa Rica, but which would agree to see the litigation through to the end and would do so knowing that it would receive little or no interim compensation. Further, most of the large law firms which could have handled the case were already representing the institutional defendants and were therefore not available. The court noted that, after failed negotiations with two firms and more than six months after Barrett Smith withdrew, the Gordon firm was chosen because one partner was already performing legal work in Costa Rica, and another partner had specialized experience in prosecuting complex fraud cases.

With respect to Altman, the former SEC attorney, the court noted that he became associated with the Gordon firm approximately seven months before that firm was retained by the receiver. At the time Altman joined the firm, the receiver had no reason to know that Altman had left the SEC to join Gordon. During the initial meetings with the Gordon firm, Armstrong (receiver) first learned that Altman had recently become associated with the firm. As a result, both Barrett Smith and the Gordon firm researched the issue of the ethical effect of Altman's prior SEC affiliation and his supervisory role while at

The above review of Second Circuit case law²⁷ reflects that disqualification motions are not easily susceptible to the usual calculus of legal analysis. To carry the analogy a bit further, it is as if the Second Circuit has attempted to set forth the legal equivalent of a mathematical formula or theory, only to encounter new and unpredicted factual aspects on application which must be taken into consideration and made to square with that theory's underlying precepts. Thus, a review of the Second Circuit case law as to disqualification motions reveals that while the court has set certain guideposts, the analysis of each case is plainly fact-driven, with great emphasis placed on the practicalities of each situation. See, e.g., **Armstrong v. McAlpin**, discussed above, and footnote 26, *supra*. Indeed, questions involving, for example, the extent to which the underlying substantive case has been litigated at the time the motion is made, the difficulty the party involved may have in finding new representation,²⁸ and whether there are remedies other than disqualification that would cure the problem raised by the motion. These are some of the questions asked by the court in various cases.

Insofar as the Second Circuit's guideposts are concerned, the cases reflect that the court is reluctant -- even loathe -- to disqualify an attorney based on the appearance of impropriety alone (Canon 9), *i.e.*, without a factual predicate leading to a finding that one of the other Canons has also been violated (usually Canons 4 or 5, and, on occasion, Canon 7). Further, in the Second Circuit it is not sufficient that an attorney merely violate a Canon; rather, the conduct giving rise to the violation must constitute a threat of taint to the trial of the substantive cause of action being litigated.

the SEC with respect to the lawsuit. The two firms concluded that Altman should not participate in the case, but that the firm should not be disqualified if Altman were properly screened from the litigation. *The matter was brought to the attention of Judge Stewart, who was the presiding district court judge, and he permitted participation by the Gordon firm. The court noted that the disqualification motion was not brought until June of 1978, almost two years after the commencement of the action, and more than two years after the Gordon firm had been retained.*

²⁷ There will be some additional Second Circuit cases cited herein more appropriately addressed, *infra*.

²⁸ This practical question is separate and distinct from the principle involving a party's right to counsel of its own choosing, a principle which the Second Circuit balances against the requirement that the highest standards of conduct be maintained.

The Second Circuit, however, has far from abdicated its role in "exercis[ing] its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct." **Emle**, *id.* at 575. Indeed, there is scarcely a Second Circuit case involving attorney disqualification which fails to invoke the high standard set by **Emle**. It is within this context that a few additional Second Circuit cases will be reviewed in aid of the disposition of the instant motion.

The first such case is **Cinema 5, Ltd. v. Cinerama, Inc.**, 528 F.2d 1384 (2d Cir. 1976), which, as the Second Circuit noted, presented "a somewhat unusual set of facts." In that case, counsel had been disqualified by the district court from further representation of Cinema 5 because Manly Fleischmann, a partner in a New York City firm was also a partner in a Buffalo firm which concurrently represented Cinerama in other litigation "of a somewhat similar nature." *Id.* at 1385. Thus, in January of 1972, the Buffalo firm was retained to represent Cinerama and several other defendants in an anti-trust law suit having its genesis in the Rochester area, brought in the Western District of New York, and which concerned allegations of discriminatory and monopolistic licensing and distribution of motion pictures. A similar action was also brought in the Western District in March of 1974, but occurring in the Buffalo area. The action in the Southern District (which gave rise to the disqualification motion), was brought in August of 1974, and involved allegations of conspiracy among the defendants, including Cinerama, to acquire control of Cinema 5 through stock acquisitions, with the intention of creating a monopoly and restraining competition in New York City's first-run motion picture theater market. Relying on **General Motors Corp. v. City of New York**, 501 F.2d 639 (2d Cir. 1974), the district court found "sufficient relationship between the two law firms and the two controversies to inhibit future confidential communications between Cinerama and its attorneys and that disqualification was required to avoid even the appearance of professional impropriety" *Id.* Cinema 5 strongly argued, however, that its counsel should not be disqualified unless the relationship between the controversies is substantial, and asserted that there was "nothing substantial in the relationship between an upstate New York conspiracy to deprive local theater operators of access to films and an attempted corporate take-over in New York City." *Id.*

Noting that the "substantial relationship" test had been customarily applied in determining whether a lawyer may accept employment against a former client, the Second Circuit stated as follows:

However, in this case, suit is not against a former client, but an existing one. One firm

in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner. *The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.*

(*Emphasis supplied*). *Id.* at 1386. The court pointed out in this regard, that a lawyer's duty to his or her client is as a fiduciary or trustee, and that when Cinerama retained Fleischmann in the Western District case, "it was entitled to feel that at least until that litigation was at an end, it has his undivided loyalty as its advocate and champion, **Grievance Committee v. Rottner**, 152 Conn. 59, 65, 203 A.2d 82 (1964), and could rely upon his 'undivided allegiance and faithful, devoted service.' **Von Moltke v. Gillies**, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948)." *Id.* Citing the New Testament, *inter alia*, for the proposition that "no man can serve two masters," the court stated that Cinerama, in the Western District litigation, "had the right to expect also that [Fleischmann] would 'accept no retainer to do anything that might be adverse to his client's interests.' **Loew v. Gillespie**, 90 Misc. 616, 619, 153 N.Y.S. 830, 832 (1915), *aff'd*, 173 App.Div. 889, 157 N.Y.S. 1133 (1st Dep't 1916). Needless to say, when Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance." *Id.*

The court then addressed Canon 5 and the ethical considerations flowing therefrom:

Ethical Considerations 5-1 and 5-14 of the American Bar Association's Code of Professional Responsibility provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty.

Id. The court expressed its opinion that, the lawyer who would sue his own client, citing as justification that the two causes of action lack a substantial relationship, "is leaning on a slender reed indeed." *Id.* The court continued:

Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned. This appears to be the opinion

of the foremost writers in the field, see Wise, [LEGAL ETHICS 256,] 272 [(2d ed.)]; Drinker, LEGAL ETHICS 112, 116, and it is the holding of the New York courts. In **Matter of Kelly**, 23 N.Y.2d 368, 376, 296 N.Y.S.2d 937, 244 N.E.2d 456 (1968), New York's highest court said that "with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship." Nor is New York alone in this view. In **Grievance Committee v. Rottner**, *supra*, 152 Conn. at 65, 203 A.2d 82, Connecticut's highest court held that *the maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client even though the nature of such employment is wholly unrelated to that of his existing representation.*

(*Emphasis supplied*). *Id.* at 1386-387. The court left aside the question of whether such adverse representation, without more, requires disqualification in every case. What the court did hold, however, was that, in cases involving concurrent representation, the "substantial relationship" test, "does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed." *Id.* Thus, the court set forth the following standard:

Where the relationship is a continuing one, adverse representation is *prima facie* improper, **Matter of Kelly**, *supra*, 23 N.Y.2d at 376, and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden

Because he is a partner in the [Buffalo] firm, Mr. Fleischmann owes the duty of undivided loyalty to that firm's client, Cinerama. Because he is a partner in the [New York City] firm, he owes the same duty to Cinema 5, Ltd. It can hardly be disputed that there is at least the appearance of impropriety where half his time is spent with partners who are defending Cinerama in a multi-million dollar

litigation, while the other half is spent with partners who are suing Cinerama in a lawsuit of equal substance.¹ [¹ Mr. Fleischmann's personal participation in the Buffalo litigation was minimal, and we are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either. *However, we cannot impart this same confidence to the public by court order. (Emphasis supplied).*].

Because "an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests," **Edelman v. Levy**, 42 App.Div.2d 758, 346 N.Y.S.2d 347 (2d Dept.1973)(mem.), this requires his disqualification. **Hull v. Celanese Corp.**, *supra*, 513 F.2d at 571; **General Motors v. City of New York**, *supra*, 501 F.2d at 649; **W.E. Bassett Co. v. H.C. Cook Co.**, 201 F.Supp 821, 825 (D.Conn.), *aff'd*, 302 F.2d 268 (2d Cir. 1962)(*per curiam*). . . .

Id. See generally **Fund of Funds, Ltd. v. Arthur Andersen & Co.**, 567 F.2d 225 (2d Cir. 1977), citing **Cinema 5, Ltd. v. Cinerama, Inc.**, *supra*, with approval.

The final case to be discussed is one arising in the District of Connecticut, **MMR/Wallace Power & Indus. v. Thames Associates**, 764 F.Supp. 712 (D.Conn. 1991), an interesting case which involved an allegation of *ex parte* contact by an attorney, Michael Forstadt of Schatz & Schatz, Ribicoff & Kotkin ("Schatz firm") with Richard Willett, a confidential former employee of MMR.

Briefly, MMR entered into a construction contract with Thames for a project in Uncasville. Willett was employed by MMR at the project site and served as MMR's office manager for approximately 14 months. His position gave Willett firsthand information regarding the day-to-day project operations. In February 1989, Thames terminated MMR's contract, giving rise to the underlying substantive litigation. MMR thereafter established an office in Norwich for the purpose of closing out the project activities and to prepare for litigation. Willett was assigned to the Norwich office, where he assisted MMR's attorneys to prepare for the contract litigation by setting up the document control system for use during discovery. Thus, Willett was responsible for reviewing, indexing and digesting all of the various discovery materials. He also prepared reports concerning issues involved in the litigation, and on at least one occasion, met with attorneys from the Schatz firm. Further, he attended confidential litigation strategy meetings, assisted in answering interrogatories and consulted with

counsel regarding the individuals to be deposed. Although Willett was reassigned to a project in North Carolina in December of 1989, he maintained weekly contact with MMR's attorneys until June of 1990. In March of 1990, Willett began discussions with MMR's attorneys concerning the possibility of his serving as a consultant in the litigation after MMR declared bankruptcy. Thereafter, Aetna Insurance Company made such an offer to Willett, to which he made a counteroffer which was neither accepted nor rejected by Aetna. Assuming that Aetna's silence was a rejection, and upset about a pay dispute, "Willett asked a friend to anonymously contact defendant's attorney, Matthew Forstadt and, without identifying Willett, see if Forstadt would be interested in speaking with him about the possibility of his becoming a trial consultant for Thames." *Id.* at 715.

Forstadt met with Willett, and asked Willett "if he was under contract to MMR, or whether he had an existing or previous employment agreement with MMR, to which Willett responded that he did not. . . . Forstadt also instructed Willett that, if he was privy to privileged communications with plaintiff's counsel, Forstadt did not want to know what was discussed, [Footnote omitted] nor was he interested in any proprietary or trade secret information belonging to MMR. Forstadt further instructed Willett to make duplicate copies of certain computer discs containing various reports, analyses and correspondence regarding the Uncasville site, and return the original discs to [MMR's attorneys]." *Id.*

On June 26, 1990, Forstadt extended an offer to Willett to hire him as an exclusive trial consultant for Thames. By chance, and prior to signing the agreement, Willett was contacted by MMR's attorneys to ask if Willett had reached an agreement with Aetna to assist with MMR's trial preparation. Willett responded that, "he had 'cut a deal' to serve as a consultant for Thames, and that under instructions he had received from Forstadt, he would no longer be communicating with [MMR's] attorneys." *Id.* at 716. MMR's attorneys thereupon informed Willett that his Thames agreement was improper and urged him not to sign it. Willett consulted with Forstadt about the situation, "who informed Willett that he had nothing to worry about, and that he should sign the agreement. . . ." *Id.* Willett executed the agreement. MMR filed the motion for disqualification on October 12, 1990.

Setting forth Second Circuit law, generally, including the maxim that the attorney's conduct must threaten to taint the pending litigation and that caution is dictated notwithstanding the court's misgivings because of the immediate effect of separating a client from his counsel of choice and because such motions are often interposed for tactical reasons. The court continued:

Nevertheless, if the court concludes that the asserted course of conduct by counsel

threatens to affect the integrity of the adversarial process, it should take appropriate measures, including disqualification, to eliminate such taint. **Papanicolaou v. Chase Manhattan Bank, N.A.**, 720 F.Supp. 1080, 1083 (S.D.N.Y. 1989).

Id. at 718. Citing **Emle** for the proposition that, "[e]ven an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action by the court[,]"⁹ *id.*, the court stated at footnote nine as follows:

That a lawyer is ethically obligated to avoid "even the appearance of impropriety" is embodied in Canon 9 of the Code of Professional Responsibility ("Code"). Although the Code has not been formally adopted in Connecticut, "its salutary provisions have consistently been relied upon by the courts in [the Second Circuit] in evaluating the ethical conduct of attorneys." **Hull**, *supra*, 513 F.2d at 571, n. 12, albeit only in the "rarest cases." **Nyquist**, *supra*, 590 F.2d at 1247. The court notes that, prior to its adoption of the [Connecticut] Rules, this court recognized the Code of Professional Responsibility of the American Bar Association as expressing the standards of professional conduct expected of lawyers. . . .

Id. at 718, n. 9. Setting forth its analytical framework, the court posed the following questions, stating that each must be answered in the affirmative if the motion is to be granted. The questions were as follows:

Did Willett have confidential or privileged information pertaining to MMR's trial preparation and strategy?

Assuming that Willett had such information, did he disclose it to attorney Forstadt?

If such information was disclosed to Forstadt, does his continued representation of Thames threaten to "taint" all further proceedings in this case?

Id. at 724. The court found that Willett possessed confidential and privileged information about the case, and then addressed the second question, *i.e.*, whether he disclosed such information to Thames' counsel. Citing **Hull**, *supra*, 513 F.2d at 572, for the proposition that a presumption arises that confidences were, in

fact, shared by Willett with attorney Forstadt, the court held that Thames failed to sustain its burden to rebut that inference.²⁹

²⁹ It is noted that the district court cited, *inter alia*, **Goldenberg v. Corporate Air, Inc.**, 189 Conn. 504, 457 A.2d 296 (1983), *rev'd on other grounds Burger and Burger, Inc. v. Murren*, 202 Conn. 660, 522 A.2d 812 (1987), which, the MMR court stated, has adopted an irrebuttable presumption. However, inasmuch as the instant case will not be considered either with respect to the disqualification motion or on the merits in the District of Connecticut, **Goldenberg** does not control. The MMR court did state, however, that, "[a]s indicated above, the courts which have considered this question are split. Although the opinions in both **Hull** and **Williams** [a 1984 Western District of Missouri case, 588 F.Supp. 1037, which does not control herein] arguably suggest that the presumption is to be considered irrebuttable, such conclusions must be considered as dicta in light of factual evidence . . . that confidential information was actually disclosed by the individual switching sides to opposing counsel." *Id.* at 726.

Leaving **Williams** aside, this Court would respectfully suggest that the MMR court's reading of **Hull** in this regard is not supportable. Thus, while the Second Circuit did set forth District Judge Owen's findings that, "'The foregoing contents of affidavits prepared by Delulio and the Rabinowitz office are some evidence, in my opinion, of the possibility that Delulio, unquestionably possessed of information within the attorney-client privilege, did in fact transmit some of it to the Rabinowitz firm, consciously or unconsciously.'" ⁷ [7 73 Civ. 3725 (S.D.N.Y., July 12, 1974), at 5.] **Hull** at 570; the Second Circuit then proceeded to set forth "[t]he unusual factual situation presented here [which] bears repetition in some detail[,] *id.*, and did not mention, or even hint, in its own recitation of the facts that any information was transmitted. Neither was this mentioned even as a "moreover" argument. Further, the fact that the **Hull** court relied on **Emle** for the proposition that the court "'need not inquire whether the lawyer did, *in fact*, receive confidential information" **Emle**, *id.* 478 F.2d at 571," **Hull**, at 572, suggests, rather, that its holding that, "[t]he breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code[,] *id.*, is more than just "dicta." Further, with respect to the Second Circuit's recitation of Judge Owen's finding, the court stated the following at footnote 8, "Judge Owen initially considered holding a hearing to determine whether there had been actual disclosures, but decided in the negative. He concluded that 'a hearing would be self-defeating since it would be necessary to reveal to the Rabinowitz firm in some specificity the extent of Celanese's disclosures to Miss Delulio in the course of ascertaining to what

With respect to the third question, the court held that Forstadt's representation of Thames threatened to taint the integrity of the case, "because the confidential information he presumably received from Willett *creates at least an appearance that defendant has obtained an unfair advantage at trial.*" (*Emphasis supplied*). *Id.* at 727. Emphasizing the fact that Forstadt not only interviewed Willett, a member of his adversary's litigation team, but sought to hire him for the defendant's exclusive use, thereby giving Thames unrestricted access to MMR's trial strategies and thereby having a "devastating effect on the outcome of the litigation[;]" the court also stated that:

Even if, as defendant maintains, no confidential information was actually disclosed, Forstadt's alliance with Willett creates a "nagging suspicion" that Thames' preparation and presentation has already been unfairly benefitted. . . .

(*Emphasis supplied*). *Id.* The court pointed out that "[t]here is little reason to believe Forstadt had any reason in hiring Willett other than obtaining information to which he was not entitled" *Id.* Further, the court noted that, "rather than simply reject Willett's overture, and remind him of his legal responsibilities, Forstadt instead offered him a contract. . . ." *Id.* The court continued:

Conduct of this sort can hardly be said to demonstrate "a cautious regard for the disciplinary rules," [citation omitted], for, at the very least, a prudent attorney would have inquired of plaintiff's counsel regarding their relationship with Willett prior to offering him a consulting contract. . . .

extent, if any, that information reached them.' [Citation omitted]." *Id.* at 570. This footnote would suggest that no factual finding in this regard was contemplated by Judge Owen, and would further suggest that the Second Circuit considered as dicta Judge Owen's statement, set forth above, concerning the contents of the affidavits and whether or not any information was transmitted. Supportive of this view is the Second Circuit's characterization of the **Emle** presumption as "irrebutable." See **Meyerhofer v. Empire Fire and Marine Insurance Co.**, 497 F.2d 1190, 1195 (2d Cir.), *cert. denied*, 419 U.S. 998, 95 S.Ct. 314, 42 L.Ed.2d 272 (1974), cited in **Hull**, *id.* at 572, and distinguished on other grounds. Finally, and because it would appear that neither this motion nor the substantive case will be within the jurisdiction of the District of Connecticut, it is doubtful whether **MMR**'s analysis in this regard would control.

Id. Forstadt and his firm were accordingly disqualified.

IV. Analysis

I shall begin the analysis herein mindful of Chief Judge Irving R. Kaufman's introductory words in **Fund of Funds, Ltd. v. Arthur Andersen & Co.**, 567 F.2d 225 (2d Cir. 1977):

We hasten to add that the lawyers involved in this dispute are individuals who enjoy the high regard of the profession. Compliance or noncompliance with Canons of Ethics frequently do not involve morality or venality, but differences of opinions among honest men [and women] over the ethical propriety of conduct.

* * *

It is a longstanding rule that, "When dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent."⁴ [⁴ **United States v. Standard Oil Co.**, 136 F.Supp. 345, 367 (S.D.N.Y. 1955), recently quoted and applied in **Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.**, 518 F.2d 751, 753 (2d Cir. 1975).] We approach our task in this factually complex case conscious of this oft-repeated admonition and with the recognition that in deciding questions of professional ethics men [and women] of good will often differ in their conclusions.

Id. at 226-27.

The operative facts, insofar as they are known, are these. Attorney Eugene Fidell has been representing the Chief Judge for approximately two years in a personnel action brought by the Department of Labor which seeks his removal as chief judge. Attorney Fidell was retained by Respondents on April 1, 1994, and in May, approximately one month thereafter, he filed an appearance as one of Respondents' attorneys in the above-captioned case. Attorney Fidell asserts in his June 16, 1994, response, that, "[b]efore accepting this matter, I made an informal inquiry of the Office of the Solicitor of Labor concerning my intent to appear for respondents. I was orally advised that the Department is not a

party to this proceeding and has no objection to my appearing for respondents. . . ." Attorney Fidell further asserts as follows:

I did not bring my representation of [the] Chief Judge . . . to the attention of the Administrative Law Judge or opposing counsel because I was (and remain) aware of no reason, either in substance or appearance, why that representation has any bearing on the propriety of my serving as counsel for respondents. In addition, the very act of making my representation of [the] Chief Judge . . . a matter of record in this proceeding could have been perceived as an indirect effort to derive some implicit advantage. Neither respondents nor I have any desire to do so. The circumstances having now been laid on the public record by the June 10 Order and this memorandum, the matter should be considered closed.

Regarding Respondents' choice of lawyers, Attorney Fidell states as follows:

[T]he Order correctly notes that respondents have other counsel. That is of no moment for present purposes, although it is testimony to the complex and multifaceted nature of the congeries of proceedings in which respondents have been unfairly embroiled. The government has fielded a battalion of lawyers from the Justice Department, the United States Attorney's Office and the Nuclear Regulatory Commission to face our squad in divers contexts. Complainant himself has two lawyers . . . and if he wanted to retain others, that would be entirely his affair. So too, absent some substantial basis to interfere with respondents' choice of counsel -- both as to number and identity -- that choice must be respected.

In a subsequent "Answer to Motion to Disqualify," dated June 21, 1994, Attorney Fidell notes that some of the Chief Judge's functions are ministerial, and that, "[o]thers are water over the dam (as in the case of the powers to receive the notice of appeal or to designate a trial judge). Still others are inapplicable on their face (as in the case of the powers to consolidate hearings or allow nonattorneys to appear). *But none of these powers has been brought into play since the undersigned was retained or entered his appearance in this proceeding.*" (*Emphasis in original*). Attorney Fidell concludes as follows:

As we explained in response to the June 10 Order, if there were, in the future, any developments that called for or permitted action by [the] Chief Judge, it is perfectly obvious that he would have to recuse himself. In the circumstances, there is no basis for disqualifying me. Complainant's motion should therefore be denied. [Footnote omitted].

It is noted, and conceded, by Attorney Fidell that any appeal of this disqualification motion is to the Chief Judge. His suggested remedy is the Chief Judge's recusal.

Like many of the cases discussed in this Order to Show Cause, the factual predicate herein breaks new ground. Further, and contrary to Attorney Fidell's understandable desire to invoke the easily accomplished option of the Chief Judge's recusal should he be asked to rule on this motion or act in some other authorized capacity with respect to this case, the ethical considerations underlying this situation are neither as straightforward, nor the remedy as facile, as Mr. Fidell would appear to suggest.

The review of Second Circuit cases reflects that the Canons of Ethics most frequently encountered by that court are Canons 4, 5, 7 and 9. As has already been pointed out, the Second Circuit will only rarely disqualify counsel based on a violation of Canon 9, alone.

Canon 4, which states that, "[a] lawyer should preserve the confidences and secrets of a client," does not have immediate applicability. Thus, this canon usually comes into play where, for example, an attorney represents client "A" in a particular lawsuit against client "B", and then in a subsequent lawsuit, represents client "B," although not against client "A," but where matters arise which adversely affect client "A." Thus, as **Emle** noted:

Canon 4 implicitly incorporates the admonition, embodied in old Canon 6, that "[t]he [lawyer's] obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." Without strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that information he reveals to his lawyer on one day may be used against him on the next.

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d at 570. In order to deal with these issues, the Second Circuit relied on the so-called "substantially related" test, *i.e.*, that the "'former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are *substantially related* to the matters or cause of action wherein the attorney previously represented him, the former client.'" **Emle, id.**, citing **T.C. Theatre Corp. v. Warner Bros. Pictures**, 113 F.Supp. 265 (S.D.N.Y. 1953).

It is apparent that the situation herein is not a Canon 4 case. Thus, this is not a situation where the attorney in question represents one client, and then after that first case has been resolved, subsequently represents another client in a matter that might adversely affect the first. Indeed, it can be said that there is no substantive matter under consideration in the second case, *i.e.*, the instant case, that would adversely affect the Chief Judge in his case, *i.e.*, the case in which Fidell first appeared. In this regard, it might be said that, the only party whose interests might be adversely affected herein, the Complainant, who is also the moving party with respect to the disqualification issue, has no connection to Attorney Fidell at all. Finally, and insofar as Canon 4 is concerned, there is no substantial relationship -- or any relationship -- between the subject matter of the Chief Judge's case and the case herein. I accordingly find that Canon 4 has no relevance to the disqualification motion under consideration. See generally **International Electronics Corp. v. Flanzer**, 527 F.2d at 1291-292. But see **Silver Chrysler Plymouth, Inc. v. Chrysler Mo. Corp.**, 518 F.2d at 757 where the court, while noting the "substantially related" test, held that where an attorney's contact with the subject matter in question is attenuated, that attorney's role cannot be considered "representation" within the meaning of **T.C. Theatre Corp.** and **Emle**, and that the attorney in question had rebutted any inference that he possessed confidences that could be used against the former client.

It would further appear that Canon 7 does not apply. Canon 7 states that, "[a] lawyer should represent a client zealously within the bounds of the law." Thus, unlike the situations in **Ceramco, Inc. v. Lee Pharmaceuticals**, 510 F.2d 268 (2d Cir. 1975), **W.T. Grant Co. v. Haines**, 531 F.2d 671 (2d Cir. 1976) or **Papanicolaou v. Chase Manhattan Bank, N.A.**, 720 F.Supp. 1080 (S.D.N.Y. 1989), there has never been an assertion herein that Attorney Fidell somehow had unauthorized contact with the Complainant. Thus, the conduct complained of is his concurrent connection to both the Chief Judge and to Respondents. This does not fall within the bounds of Canon 7, and I so find.

Canon 5, however, presents a somewhat different issue. That Canon states that, "[a] lawyer should exercise independent professional judgment on behalf of a client," and there are two

"Ethical Considerations" which may apply. EC 5-1 states as follows:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. [Footnote omitted]. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-14 states as follows:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client.¹⁷ This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.¹⁸

¹⁷ See ABA Canon 6 [1908 enactment]

¹⁸ The ABA Canons speak of "conflicting interests" rather than "differing interests" but make no attempt to define such other than the statement in Canon 6 [1908 enactment]: Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976), which addresses the Canon 5 issue, is set forth in detail, above. Similar to Manly Fleischmann and his two law firms in **Cinema 5**, Mr. Fidell has a concurrent relationship with two clients in two separate proceedings. Unlike **Cinema 5**, however, there is no one party herein which appears in both the proceeding involving the Chief Judge and the instant case. Thus, in the **Cinema 5** scenario, one of Fleischmann's firms represented Cinerama in one case, and in the other case, in which Cinerama was also a party, Fleischmann's other firm represented Cinema 5, Ltd. against Cinerama. Cinerama, represented in the **Cinema 5** proceeding by Louis Nizer's firm, brought the motion for disqualification. As set forth in detail above, Fleischmann's New York City firm took the position that where there is no substantial relationship between the controversies, there is no basis for disqualification. The Second

Circuit held, however, that where the same party appears in two lawsuits, and an attorney is retained by the party in one case, but is appearing against that client in another case, the issue is not so much the similarity of the two causes of action, but rather the duty of undivided loyalty that an attorney owes to each of his or her clients.

Clearly, the Chief Judge does not stand in Cinerama's shoes, and as Mr. Fidell has pointed out, the Solicitor, who has apparently brought the action on behalf of the Department of Labor in the Chief Judge's case, is not a party to this proceeding. These factors, however, do not end the inquiry because, as the Second Circuit points out in **Cinema 5**:

Ethical Considerations 5-1 and 5-14 . . . provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty. . . .

Cinema 5, Ltd. v. Cinerama, Inc. 528 F.2d at 1386.

It is this requirement that brings us to the nub of the issue herein: Can Mr. Fidell represent the Chief Judge and also represent Respondents free from concern that a position, action or failure to act in one case will have ramifications for the other. In **Cinema 5**, the crux of the disqualification was the presence of Cinerama as a party in both lawsuits. In the instant case, the problem that arises is that the existence of Mr. Fidell's attorney-client relationship with the Chief Judge raises the potential for *ex parte* contact -- indeed, it raises the question of whether Mr. Fidell's relationship with the Chief Judge, in the context of his concurrent relationship with Respondents herein, is *ex parte per se*.

In this regard, as has been noted at footnote 16 (see page 21, *supra*), Attorney Fidell has already been required to make a choice involving his attorney-client relationship with the Chief Judge, which has had ramifications herein. That choice was whether or not Mr. Fidell should disclose his representation of the Chief Judge to his opposing counsel, as well as to this Court. Mr. Fidell chose not to do so, at least in part, because "the very act of making my representation of [the] Chief Judge a matter of record in this proceeding could have been perceived as an indirect effort to derive some implicit advantage." On the other hand, and the Court emphasizes that there is no evidence to support this proposition, it might also be argued that the failure to disclose might be similarly indicative of an indirect effort to derive some implicit advantage. It is this kind of concern which lies at the very heart

of what defines *ex parte* within the context of Canon 5, *i.e.*, action taken, or not taken, for the benefit of one side only. Thus, while Attorney Fidell does not represent two adverse interests within the meaning of **Cinema 5**, it might be said, as does Ethical Consideration 5-14, that dilution of one's loyalty to one's clients arises when these clients "may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant." It would appear that while the interests of Attorney Fidell's two clients are not adverse, they might well be characterized as "discordant," and would thereby have the potential to taint the substantive proceeding herein.³⁰ Thus, as noted above, Attorney Fidell's representation of Respondents has already been compromised by his having to take his representation of the Chief Judge into account when deciding whether or not to disclose that attorney-client relationship.

Finally, Canon 9 must be addressed. Canon 9 states that, "[a] lawyer should avoid even the appearance of impropriety." As fully set forth above, the Second Circuit, and the federal district

³⁰ It is noted that while neither of Attorney Fidell's clients has raised the disqualification issue, it is well settled that a court has the authority to raise such questions *sua sponte*. See generally **Empire Linotype School v. United States**, 143 F.Supp. 627 (S.D.N.Y. 1956), stating:

Assuming *arguendo* that the Government had delayed making the motion to disqualify, the Court would not be precluded or estopped from adjudicating the question now before it. The Court's duty and power to regulate the conduct of attorneys practicing before it, in accordance with the Canons, cannot be defeated by the laches of a private party or complainant. Thus, the Court, on its own motion, may disqualify an attorney for violation of the Canons of Ethics. **Porter v. Huber**, D.C.W.D.Wash.1946, 68 F.Supp. 132. And, by a parity of reason, it is the responsibility of the Court to ascertain whether there is any merit to the accusation when once an alleged violation of the Canons has been called to the Court's attention. **United States v. Standard Oil Co.**, D.C.S.D.N.Y.1955, 136 F.Supp. 345, 351, note 6.

Id. at 631. See also footnote 33, *infra*.

courts therein, do not often disqualify a lawyer based on Canon 9 alone, *see, for example* **Bd. of Ed. of N.Y. City v. Nyquist**, 590 F.2d 1241 (2d Cir. 1979), and **Armstrong v. McAlpin**, *id.*, 625 F.2d 433 (2d Cir. 1980); but it has been done, *see* **Hull v. Celanese Corporation**, 513 F.2d 568 (2d Cir. 1975)³¹, and **MMR/Wallace Power & Indus. v. Thames Associates**, 764 F.Supp. 712 (D.Conn. 1991).

Hull, like **MMR**, involved a type of *ex parte* situation in that, in the context of a sex discrimination lawsuit, Celanese's in-house counsel (Delulio) asked to intervene as a plaintiff in Hull's case. Applying Canon 9, and citing **Ceramco, Inc. v. Lee Pharmaceuticals**, 510 F.2d 268, 271 (2d Cir. 1975), the court emphasized the need "to guard against against the danger of inadvertent use of confidential information" Thus, Celanese sought disqualification of the Rabinowitz firm based on the risk that confidential information received by Delulio as Celanese's attorney might be used by the Rabinowitz firm against Celanese in the prosecution of the joint Hull-Delulio claims. The Rabinowitz firm contended that they had never worked for Celanese and therefore never had direct access to confidences of Celanese. The court set forth Rabinowitz's intentions with respect to the sharing of any such confidences:

[The Rabinowitz firm] maintain[s] that they carefully cautioned Delulio not to reveal any information received in confidence as an attorney for Celanese, but rather to confine her revelations to them to the facts of her own case. This, they contend would avoid even an indirect transferral of confidential information. They conclude that since they never got any information either directly or indirectly, they could not use the information either consciously or unconsciously.

Hull, *id.* at 571. The court responded that the argument was "somewhat technical in nature," and that it "seems to overlook the spirit of Canon 9 as interpreted by this Court in **Emle**." The court continued:

We credit the efforts of the Rabinowitz firm to avoid the receipt of any confidence. Nonetheless, **Emle** makes it clear that the

³¹ **Emle Industries, Inc. v. Patentex, Inc.**, 478 F.2d 562 (2d Cir. 1973), is not quite a pure Canon 9 case in that it does touch on Canon 4, *id.* at 570. The **Hull** court noted, however, that in **Emle**, the Second Circuit felt that, "the invocation of Canon 9 was particularly appropriate [footnote omitted]." **Hull v. Celanese**, 513 F.2d at 571.

court need not "inquire whether the lawyer did, *in fact*, receive confidential information. . . ." **Emle Industries, Inc. v. Patentix, Inc.**, *supra*, 478 F.2d at 571. Rather, "where 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation,' **T.C. Theatre Corp.**, *supra* [113 F.Supp.] at 269 (emphasis supplied), it is the court's duty to order the attorney disqualified." *Id.* at 571. *The breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code.*

(*Emphasis supplied*). *Id.* at 572.

Unlike **Hull**, there is no attorney in this case "switching sides." Also unlike **Hull**, there are two legal actions herein, not one, and I have already found that they are unrelated. What we do have, however, is an individual, Mr. Fidell, who maintains a concurrent attorney-client relationship with both the Chief Judge and with Respondents herein. In this regard, Attorney Fidell argues that the Chief Judge has no authority over the instant case, and in those areas where he might be required to exercise his authority, he would recuse himself.

Like the **Hull** court's characterization of the arguments made by the Rabinowitz firm, this argument, too, seems somewhat technical in nature, and overlooks not the relationship of the Chief Judge to the instant case, but the relationship of the Chief Judge to the other administrative law judges over whom he exercises administrative authority. Thus, the fact that, as Attorney Fidell properly points out, the undersigned enjoys statutorily protected tenure of office and freedom from performance ratings, is not the point. Simply put, reprisal against the presiding judge is not the issue here. Rather, it is the *potential* for shared confidences, either consciously or unconsciously that is the feared-for transgression, or overstepping, herein; and as the Second Circuit has pointedly noted in **Hull**, the breach of confidence would not have to be proved, it is *presumed* in order to preserve the spirit of the Code.

In the context of the potential for shared confidences, the contemplated recusal of the Chief Judge is irrelevant. Indeed, it would only serve to beg the question: recusal from what? Thus, the Chief Judge does not preside in this case. As for the presiding judge, and under the circumstances of this case, there is no recusal possible for the undersigned, for if I cannot hear this

case, no Department of Labor judge may hear it either.³²

Finally, and of equal importance, is that the potential for shared confidences in this situation creates an appearance of impropriety sufficient to taint the instant proceedings. Thus, the potential for shared confidences would go to the very heart of the litigation process itself. As the Second Circuit has noted, "[t]he dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." **Emle Industries**, *supra*, at 571. This Court can conceive of no rationale that would render this set of circumstances ethically acceptable to the bar, the courts or the public's interest in the integrity of the judicial process itself. Indeed, the Second Circuit has repeatedly held that any doubt is to be resolved in favor of disqualification. *See, for example Hull v. Celanese Corporation*, 513 F.2d at 571. Finally, as then-Circuit Judge Kaufman stated in **Emle**:

We have said that our duty in this case is owed not only to the parties . . . but to the public as well. These interests require this court to exercise its leadership to insure that nothing, not even the appearance of impropriety, is permitted to tarnish our judicial process. The stature of the profession and the courts, and the esteem in which they are held, are dependent upon the complete absence of even a semblance of improper conduct.

Id. at 575.³³ ³⁴

³² Compare **Potashnick v. Port City Construction Co.**, 609 F.2d 1101 (5th Cir. 1980), which concerned the failure of a judge to disqualify himself based on his involvement in business dealings with the plaintiff's attorney. Thus, in that case, it was the presiding judge who suffered the conflict. In the case herein, the conflict lies with the attorney.

³³ See also **MMR/Wallace Power & Indus. v. Thames Associates**, 764 F.Supp. 712 (D.Conn. 1991) which has already been set forth above at length. The Court wishes to emphasize that it does not in any fashion equate the conduct of Attorney Forstadt with the situation herein. However, the district court does address the issue of Forstadt's relationship with Willett, the individual who had been allied with MMR and was now allied with Thames, stating that, "[e]ven if, as [Thames] maintains, no confidential

The next issue to be addressed is the balancing of a party's right to be represented by an attorney of its own choice as against the threat of taint to the proceeding if the attorney remains. See **Hull v. Celanese Corporation**, *id.*; **W.T. Grant v. Haines**, 531 F.2d 671 (2d Cir. 1976), which discusses this balancing and which is set forth above at pages 33-5; and **Armstrong v. McAlpin**, 625 F.2d 433 (2d Cir. 1980), discussed above at pages 38-9, and footnote 26. As is apparent from a review of the cases, the court looks to certain factors when it balances the needs of the party to chose his or her own lawyer, as against the threat of taint to the proceeding. Some of these factors are: the length of time the attorney has been representing the party, the availability of other counsel, and whether there is another remedy that would have the same effect as disqualification and thereby cure any potential for taint.

information was actually disclosed, Forstadt's alliance with Willett creates a 'nagging suspicion' that Thames' preparation and presentation has already been unfairly benefitted." *Id.* at 727. There is one additional point to be made regarding MMR, and that is the fact that when Forstadt was approached by Willett offering his services, Forstadt failed to contact MMR's attorneys. As the court put it, "at the very least, a prudent attorney would have inquired of plaintiff's counsel regarding their relationship with Willett" *Id.* Again, and emphasizing that Forstadt's conduct is not to be equated with the situation herein, it might be said that when Attorney Fidell undertook to represent Respondents in this case, prudence would have suggested that both Complainant's counsel and this Court be informed as to his attorney-client relationship with the Chief Judge and as to his intentions to represent Respondents herein. Mr. Fidell's inquiry to the Solicitor reflects that he did have some concern. However, when the Solicitor's office informed him that it is not a party to this proceeding and had no objection to his appearing on behalf of the Respondents, Attorney Fidell would have been better served had he then made such inquiry to someone who was a party to this proceeding, or to the Court. Indeed, this Court learned of the situation purely by happenstance. See footnote 31, *supra*.

³⁴ There is one additional point to be raised, and that is the question of whether Attorney Fidell's representation of the Chief Judge, in an action where the U.S. Department of Labor, and presumably, the Secretary, is the opposing party, may also threaten to taint this proceeding in that any decision by the undersigned on the merits of this case is "recommended." It is the Secretary who issues the final decision and order.

In the case herein, Mr. Fidell undertook to represent Respondents on April 1, 1994 and made a formal appearance in this case in May of 1994, or a period of four months, up to the present. While he has filed several motions and responses, the greatest portion of these relate to the disqualification issue itself. Under these circumstances, I find that the length of Mr. Fidell's tenure as one of Respondents' attorneys, as well as the degree of his involvement in this case, is not so great as to prejudice Respondents in their defense of this matter.

Further, Respondents have other, able, counsel in this case who have been representing them since the inception of this matter more than one year ago. Mr. Fidell notes in his June 16, 1994 response, that the presence of other counsel representing Respondents, "is of no moment for present purposes [and that] Complainant himself has two lawyers . . . and if he wanted to retain others, that would be entirely his affair. So too, absent some substantial basis to interfere with respondents' choice of counsel -- both as to number and identity -- that choice must be respected." Mr. Fidell correctly points out that the number of attorneys that one retains is irrelevant. Indeed, it might be said that a party can never have too many lawyers, if numbers are the only issue at hand. That is not the case herein, however. Thus, the question here is whether Respondents will be able to retain other, competent, counsel who will be able to meet their needs should Mr. Fidell be disqualified. In this case, Respondents already have competent counsel, even absent Mr. Fidell. See, for example the discussion at footnote 26, above, which presents the situation where there were no other available competent counsel. I accordingly find that Respondents will not be prejudiced if Attorney Fidell is disqualified.

The final question in this regard is whether there is a remedy other than disqualification which would have the effect of removing the potential for taint. Some of the cases note that disqualification issues can often be handled by bar association grievance committees. This is not such a case, however. Thus, the threat of taint here is grounded in Mr. Fidell's relationship to the Chief Judge and his concurrent relationship to Respondents in this case. This situation will not be remedied by a bar association ruling. In addition, there is the very real question of which bar association would have jurisdiction herein. As has already been discussed, this case arises in Connecticut, and Mr. Fidell is not licensed to practice in that jurisdiction. Referral to a bar association would thus raise more questions than it would solve. In addition, I have already rejected recusal as being irrelevant to the circumstances of this case.

There is one other possibility that merits mention, and that is the construction of the so-called "Chinese Wall," or "screening." Screening involves setting up a procedure whereby an attorney whose presence in a case would otherwise cause a conflict,

is screened from any contact with the ongoing litigation so that his or her firm might therefore continue to participate. See generally **Papanicolaou v. Chase Manhattan Bank, N.A.**, 720 F.Supp. 1080 (S.D.N.Y. 1989), and cases cited therein. It would not seem to apply herein, for several reasons. Firstly, it is not Attorney Fidell who would need to be screened. Thus, he does not need screening from *his* law firm; neither can he be screened from the Chief Judge who is, after all, his client. Secondly, screening the Chief Judge is tantamount to recusal, and I have already held that recusal will not cure either the appearance of impropriety or the threat of taint. Finally, screening would not aid Attorney Fidell in curing the problems raised by Canon 5, *i.e.*, the duty of undivided loyalty that an attorney owes to each of his or her clients. I accordingly find that screening is not an appropriate mechanism to cure the threat of taint.

There is one more aspect to "screening" that should be noted herein, and that goes to Attorney Fidell's failure to disclose to opposing counsel or to this Court, his attorney-client relationship with the Chief Judge. If screening were to be an alternative "cure" herein, and I have found that under the circumstances of this case that it is not, Attorney Fidell would be required to show that he "implemented effective prophylactic measures to insulate an infected attorney." *Id.* at 1086. In this regard, the court noted its "doubts [as to] whether any Chinese walls, *which are meant to be preemptive*, can ever function effectively when erected in response to a motion [to disqualify], and not prior to the arising of the conflict. [Citation omitted]." *Id.* at 1087. Thus, without timely disclosure, there can be no screening; and even though the motion was filed in response to the Court's disclosure, Attorney Fidell's duty of undivided loyalty to Respondents had already been compromised.³⁵

Accordingly, and based on the current state of the record, I find that, as between Respondents right to counsel of their own choice and removing the threat of taint by disqualifying Attorney Fidell, the balance must fall on the side of disqualification.

V. Procedure

A. *Further Proceedings on the Disqualification Motion*

The first issue to be addressed is the nature and type of

³⁵ See generally **Armstrong v. McAlpin**, 625 F.2d 433, 436 (2d Cir. 1980)(*en banc*), *vacated on other grounds and remanded*, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981), for a discussion of the steps taken by the parties when they learned of the possible conflict. See also in this regard, footnote 26, above.

proceeding involving disqualification motions. The parties are entitled to a hearing with respect to these motions. See generally **Schwebel v. Orrick**, 153 F.Supp. 701 (D.C.D.C. 1957); **Koden v. United States Department of Justice**, 564 F.2d 228 (7th Cir. 1977); **Rex v. Ebasco Service, Inc.**, Case Nos. 87-ERA-6, 87-ERA-40, Sec'y. Dec. and Order, March 4, 1994. See also **Touche Ross & Co. v. Securities & Exch. Com'n.**, 609 F2d 570 (2d Cir. 1979), which primarily concerned the "exhaustion doctrine" in the context of an administrative proceeding to determine whether certain accountants had engaged in unethical conduct.

However, while an on-the-record hearing on the disqualification motion is available, not every party in every case avails themselves of it. For example, some cases are submitted on affidavits, depositions, briefs or oral argument. See, for example **E.F. Hutton & Company v. Brown**, 305 F.Supp. 371 (S.D.Tex. 1969), wherein the court noted the following:

Both Hutton and Brown have stated in their briefs that they consider this record complete, and neither has asked to offer any live testimony or requested an evidentiary hearing. Although each originally requested oral argument, both later waived oral argument and agreed to submit the motion on the lengthy briefs already filed.

Id. at 376. **Papanicolaou v. Chase Manhattan Bank, N.A.**, 720 F.Supp. 1080 (S.D.N.Y. 1989), involved contact and discussion of the case between defendant's attorney and the plaintiff in the absence of plaintiff's attorney. With respect to the procedural issue of whether a hearing was warranted, the court noted as follows:

The Court offered to hold a hearing to ascertain exactly what was said during the meeting but counsel for both parties expressed the opinion that the court should decide the matter without a hearing. The affidavits of the plaintiff and the Milbank partner conflict with respect to the content and import of their conversation;[footnote omitted] but it is not disputed that the two argued the merits of the case at length

Id. at 1082. By contrast, in **Fund of Funds, Ltd. v. Arthur Andersen & Co.**, 567 F.2d 225 (2d Cir. 1977), which involved disputed facts, the district court judge "[took] extensive testimony" *Id.* at 232. In **General Motors Corporation v. City of New York**, 501 F.2d 639 (2d Cir. 1974), the court noted that, "[t]he facts necessary to an understanding of our disposition of these appeals have been gleaned, in the main, from the complaint

and from the affidavits filed by the parties in support of and in opposition to the respective motions at issue. They are, thankfully, rather straightforward and, in all material respects, undisputed." *Id.* at 641. Cf. **Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.**, in which the parties submitted "voluminous affidavits, copies of pleadings in cases in which [the attorney in question] had allegedly worked, and extensive memoranda of law. . . . and . . . oral argument" *Id.* at 752. Interestingly, the court also noted, "[t]horough consideration of the facts, as more elaborately set forth in the opinion below, is required. [footnote omitted]. Nor can judges exclude from their minds realities of which fair decision would call for judicial notice." *Id.* at 753. **Hull v. Celanese Corporation**, 513, F.2d 568, 570 (2d Cir. 1975), also appeared to rely on affidavits and other documentary evidence in reaching the decision to disqualify. **MMR/Wallace Power & Industrial, Inc. v. Thames Associates**, 764 F.Supp. 712 (D.Conn. 1991), appeared to rely on deposition testimony, affidavits and documentary evidence. **Lefrak v. Arabian Am. Oil Co.**, 527 F.2d 1136 (2d Cir. 1975), is comprehensive as to this issue. Citing **Hull**, the court stated as follows:

Certainly the method of conducting the inquiry is within the discretion of the judge charged with the responsibility of supervision. This court has not mandated any procedure. The trial judge may be able to make the determination of impropriety *vel non* on the basis of oral arguments and affidavits, **General Motors Corp. v. City of New York**, 501 F.2d 639 (2d Cir. 1974), he may appoint a special master to ascertain the facts, **Fisher Studio, Inc. v. Loew's Inc**, *supra*, or he may conduct the evidentiary hearing which was provided here. In addition to the affidavits submitted, Judge Costantino did examine the list of proposed questions submitted by appellants' counsel and he did permit counsel to interrupt the proceeding to suggest further questioning. Whether discovery is permissible is clearly within his discretion in any event, **Lehigh Valley Industries, Inc. v. Birenbaum**, 527 F.2d 87 (2d Cir., Nov. 28, 1975); **H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories**, 384 F.2d 97 (2d Cir. 1967), and that discretion should be rarely disturbed in non-adversary proceeding involving attorney disqualification.

Id. at 1140.³⁶

Based on all of the above, if any party herein intends to submit evidence in addition to whatever documents are already before the Court, I find that any of the above enumerated methods are acceptable and would satisfy due process concerns in this regard.

B. The Nature and Effect of This Order to Show Cause

³⁶ Thus, the Second Circuit provided some instructive background. The court noted that, "appellants here do not seek a reversal of the order of the court below and a disqualification of counsel. Rather, they ask us to vacate that order and remand to the district court for further hearings 'with instructions for a full and vigorous investigation of the underlying facts.' The remand sought is based on the premise that the disqualification proceeding is not properly termed a 'judicial proceeding' but in fact is adversary in nature, entitling the defendants' counsel to employ the traditional litigation techniques of discovery as well as direct and cross-examination. We think that this argument is based upon a misconception of the [district court] proceeding below and is in fact unsupported by authority. On the contrary, more than a century ago Mr. Justice Field in **Randall v. Brigham**, 74 U.S. (7 Wall.) 523, 540, 19 L.Ed. 285 (1869) made the following pertinent comments:

'It is not necessary that proceeding against attorneys for malpractice, or an unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.'

Id. at 1140.

On considering how this motion would be handled procedurally, and after extensive research, it was concluded that an order to show cause would be appropriate herein. As an initial matter, and considering the numerous issues raised by the motion to disqualify, it was thought that the parties should have the opportunity to view the thinking of the Court and the way in which the Court has thus far analyzed the complex issues presented.

Far more important from Respondents' point of view, is the procedural effect of couching this Order as one to show cause and whether it thereby acts to deny Respondents due process by, in effect, prejudging the motion. For the following reasons, I find that a show cause order herein is appropriate. Firstly, an order to show cause is not a final order. Thus, it allows a party to rebut whatever findings or analysis have been made in support of the order's conclusion. Generally speaking, the moving party, here, the Complainant, would have the burden of making out a *prima facie* case, which, if successfully done, would place upon Respondents the burden of production to show that disqualification is not warranted. The burden of persuasion, however, would remain with the Complainant. See generally, **Mitchell v. Flynn**, 478 A.2d 1133 (Me. 1984). While Complainant herein was the moving party, and did offer argument in support of the motion, there was no evidence, as such, presented. Nonetheless, in the context of a disqualification motion, which raises questions involving ethical conduct, the Court may both raise issues and analyze them, *sua sponte*. See **Empire Linotype School v. United States**, 143 F.Supp. 627 (S.D.N.Y. 1956), cited above at footnote 30. Further, the Court may rely on Respondents' concessions (see, for example, Attorney Fidell's explanation as to the reason underlying his failure to disclose); and certainly, the Court has relied on facts which are undisputed (for example, Attorney Fidell's attorney-client relationship with both the Chief Judge and with Respondents herein); all of which findings are, in the Court's view, supported by the extensive Second Circuit case law on issues involving disqualification. This is not to say that Attorney Fidell and Respondents may not adduce further evidence in the manner of their own choosing and thus provide the basis for an ultimate finding that disqualification herein is not warranted; and, indeed, they are invited to submit such evidence. However, based on all of the above, and on **Randall v. Brigham**, 74 U.S. (7 Wall.) 523, 540, 19 L.Ed. 285 (1869), I find that under the circumstances of this case, an Order to Show Cause is an appropriate procedural vehicle.

C. Some Thoughts Regarding Appeal of This Matter

The regulations provide that any appeal of this disqualification matter, regardless of which party prevails, would be to the Chief Judge. See 29 C.F.R. § 18.36(b). It is assumed that the Chief Judge would recuse himself from this matter. The question arises, however, where any subsequent appeal would lie.

In this regard, I would ask the parties to consider the effect of **Armstrong v. McAlpin**, *id.* at 625 F.2d 433, on any appeal resulting from the disqualification proceedings herein, including the issue of whether, if disqualification is ordered, the Secretary rules on the disqualification, or whether it is considered wholly collateral within the meaning of **Armstrong**, and therefore not subject to a final decision by the Secretary absent a recommended decision and order on the merits. *Id.* at 438.³⁷

Finally, I would ask the parties to consider the following language found in 29 C.F.R. § 18.36(b), that, "[a]ny attorney or other representative so suspended or barred may appeal to the Chief Judge but no proceeding shall be delayed or suspended pending disposition of the appeal; provided, however, that the administrative law judge shall suspend the proceeding for a reasonable time to obtain another attorney or representative," and whether it is consistent or inconsistent with the following language found in **Armstrong**:

We do not reach the same conclusion, however, with respect to orders *granting* disqualification motions. In such cases, the losing party is immediately separated from counsel of his choice. If the order is erroneous, correcting it by an appeal at the end of the case might well require a party to show that he lost the case because he was improperly forced to change counsel. This would appear to be an almost insurmountable burden. In addition, permitting an immediate appeal from the grant of a disqualification motion does not disrupt the litigation, since the trial must be stayed in any case while new counsel is obtained.

Id. at 440-41.

ORDER

1. Respondents are hereby *ORDERED* to show cause why Attorney Eugene R. Fidell should not be disqualified from participating in this proceeding as Respondents' counsel.

³⁷ Cf. **Rex v. Ebasco Services, Inc.**, *id.* where the Secretary ruled as to the ordered sanction, and rejected it, but made the ruling in the context of the entire case which was before him on the merits.

2. The parties are further *ORDERED* to inform the Court by close of business, Friday, August 19, 1994, as to whether they wish to present further evidence in this matter, and the form that such evidence will take.

JOAN HUDDY ROSENZWEIG
District Chief Administrative
Law Judge

